



PROFESSIONAL SERVICES AND EQUIPMENT TERMS (CANADA)

These Professional Services and Equipment Terms (the “**Agreement**”) between Customer and Avaya govern Customer’s purchase of Avaya Professional Services and are incorporated into an Order and/or a Service Description, as applicable, by reference. A copy of this Agreement also can be found at <https://support.avaya.com/TermsOfSale>.

1. SCOPE AND DEFINITIONS

1.1 Scope. Avaya will provide to Customer: (i) Professional Services; and/or (ii) phones or other hardware (“**Hardware**”), or licensed Software (collectively, “**Equipment**”). Such Professional Services and Equipment will be specified in an Order, which may, if applicable, incorporate a SOW, Documentation or Service Description.

1.1.1 Order Placement. Orders are subject to acceptance by Avaya and Avaya may accept an Order and/or a Service Description by commencing to perform the Services. Accepted Orders and/or Service Descriptions will be governed by this Agreement. All other terms and conditions referenced in the Order and/or Service Description will have no effect, unless expressly accepted in writing by Avaya. Customer may submit Orders to Avaya by electronic mail, at the email address provided by Avaya to Customer, or other agreed means of electronic communication. Any electronic Order will be binding upon Customer’s electronic submission as if submitted in writing.

1.2 Equipment Changes. Prior to delivery of Equipment, Avaya may make changes to the Equipment, modify the drawings and specifications relating to the Equipment, or substitute to Equipment for Equipment of a later design, provided that the changes do not have a materially adverse effect on the function of the Equipment. Notwithstanding the foregoing, the parties may agree to change an Order at any time and such changes may be subject to additional charges.

1.3 Definitions. “**Affiliate(s)**” means, with respect to either party, any entity that is directly or indirectly controlling, controlled by, or under common control with a party to this Agreement. For purposes of this definition, “**control**” means the power to direct the management and policies of such party, directly or indirectly, whether through ownership of voting securities, by contract or otherwise; and the terms “**controlling**” and “**controlled**” have meanings correlative to the foregoing. “**Avaya**” means Avaya Canada Corp., unless stipulated otherwise in the applicable Order or Service Description. “**Documentation**” means information published in varying media which may include product information, service descriptions, operating instructions and performance specifications that are generally made available to users of products. Documentation does not include marketing materials. “**Order**” means an order placed by the Customer to Avaya setting out the Equipment and Professional Services being purchased by the Customer, and that has been accepted by Avaya by: electronic mail or other agreed upon means of electronic communications (to addresses provided by Customer to Avaya) or upon shipment or delivery of Equipment or commencement of Professional Services performance. “**Professional Services**” may include installation and configuration of Equipment. “**Service Description**” means the applicable description of the Professional Services or Equipment then current as of the date of Avaya’s acceptance of an Order and available to Customer upon request. “**Statement of Work**” or “**SOW**” means a document executed by the parties describing the features, terms and conditions of Equipment or Professional Services being purchased by Customer. “**Software**” means computer programs in object code, provided by Avaya whether as stand-alone products or pre-installed on Equipment, and any upgrades, updates, patches, bugfixes, or modified versions thereto.

2. INVOICING AND PAYMENT

2.1 Services will be invoiced upon completion, or as specified in the Order and/or Service Description. Avaya will invoice and process payments via Avaya’s electronic bill application.

2.2 Payment of invoices is due within thirty (30) days from the date of Avaya’s invoice. Customer will inform Avaya in writing of any disputed portion of an invoice within fifteen (15) days from the date of Avaya’s invoice. Customer will pay all bank charges, taxes, duties, levies and other costs and commissions associated with other methods of invoicing and payment. Avaya may suspend performance of Orders for which payment is overdue until the overdue amount is paid in full. If Customer is late in making payment, Avaya may charge the lesser of 1.5% per month or the maximum rate allowed by applicable law for overdue payments. Customer will reimburse Avaya for reasonable attorneys’ fees and any other costs associated with collecting delinquent payments.

2.3 Taxes. Unless Customer provides Avaya with a current tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, excise or other taxes and fees which may be levied upon the Services, except for any income tax assessed upon Avaya.

3. DELIVERY, TITLE AND RISK OF LOSS

3.1 Delivery and Risk of Loss Unless otherwise agreed in an Order, all deliveries of Equipment will be made CIP (Destination on Order or Delivery Point). Avaya may charge Customer for shipping and handling charges in relation to the delivery of Equipment, which may be reflected as a separate line item on Avaya’s invoice. Risk of loss will pass to Customer on the Delivery Date.

3.2 Title to Hardware. Unless hardware is sold on an as-a-Service basis title to the hardware will pass to Customer on the Delivery Date for deliveries in Canada. Avaya may, in its sole discretion and at any time, waive the requirement of payment prior to passing of title to hardware, in which case title will pass to Customer on the Delivery Date or (if later) on the date payment in full is made.

3.3 Title to Software does not Pass. Software that is Equipment is licensed to Customer as specified in Section 2. Title to Software will remain with Avaya and its licensors (provided that Customer will be entitled to retain the copies of the Software supplied for the duration of the license term that applies to the use of the Software concerned).

3.4 Security Interest. Until Avaya has received payment in full from Customer for Hardware, Customer authorizes Avaya to register Avaya’s retention of title pending payment in the applicable official registers of any national or local jurisdiction to which the applicable Product is delivered or physically located. Customer will on request from Avaya (and at Avaya’s expense) execute all such documents and take all actions reasonably requested by Avaya to enable Avaya to exercise its rights to security under this Section.

4. LICENSES

4.1 License to Hardware or Software. Subject to Customer's payment of fees for the Professional Services, Avaya grants Customer a non-exclusive, non-transferable, limited, non-sublicensable license to use Hardware or Software created by Avaya and delivered to Customer. Software contained in Hardware or Software will be licensed subject to the Avaya Global Software License Terms found at <http://support.avaya.com/LicenseInfo> or a successor site.

5. DELAYS

Any delays in the performance of Professional Services caused by Customer may result in additional applicable charges for resource time. If such delay continues for more than 30 days, Avaya may terminate the Order and Customer agrees to pay for all Professional Services performed to date of termination and if applicable, any termination fees.

6. WARRANTY

6.1 Warranty Period. Professional Services: Avaya warrants that Professional Services will be performed in a professional and workmanlike manner by qualified personnel, and that for a period of 30 days from the acceptance or deemed acceptance date of the Professional Services, the Professional Services will conform in all material respects to the specifications contained in the Order and/or Service Description. **Equipment:** Avaya warrants to Customer that during the warranty period, the Equipment will conform to and operate in accordance with the applicable Documentation in all material respects. Unless a different period is specified on the Order, the warranty periods for Equipment is as follows: (a) hardware: 12 months, beginning on the Delivery Date; and/or (b) Software and Software media: 90 days, beginning on the Delivery Date.

6.2 Remedies. Professional Services: If Professional Services do not conform to their warranty and Avaya receives from Customer during the applicable warranty period a written notice describing in reasonable detail how the Professional Services failed to be in conformance, Avaya will, at its option: (i) re-perform the applicable Professional Services or (ii) refund to Customer any pre-paid fees for the non-conforming Professional Services. **Equipment:** If Equipment does not conform to the warranty above and Avaya receives from Customer during the applicable warranty period a written notice describing in reasonable detail how the Equipment failed to be in conformance, Avaya will, at its option: (a) repair or replace the Equipment to achieve conformance; or (b) refund to Customer the applicable fees paid for the non-conforming Equipment, upon return of the non-conforming Equipment to Avaya in accordance with Avaya's instructions. Replacement Equipment may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent and will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya will become Avaya's property. Replacement Equipment are warranted as above for the remainder of the original applicable Product warranty period. For Software warranty claims, Avaya will provide access to available Software corrective content and Equipment support knowledge base on a self-service basis.

6.3 Equipment Warranty Procedures.

6.3.1 Equipment subject to a warranty claim must be returned to Avaya in accordance with Avaya's instructions accompanied by evidence that the Equipment remain under warranty (i.e. a valid invoice, and in some cases, this may also require Equipment registration with Avaya). Customer shall place warranty requests by sending an email or calling the numbers detailed in the Service Description.

6.3.2 If Equipment is returned within the applicable warranty period subject to a valid warranty claim, Avaya will not charge for any repair, replacement, error identification or correction, or return shipment of the non-conforming Equipment. If Avaya determines that the Equipment was operating in conformance with its applicable warranty, Avaya may charge Customer for error identification or correction efforts, repair, replacement and shipment costs at Avaya's then current time and materials rates.

6.4 Equipment Warranty Exclusions. The above-referenced warranty does not extend to any damages, malfunctions, or non-conformities caused by: (a) Customer's use of Equipment in violation of this Agreement or in a manner inconsistent with the Documentation; (b) normal wear due to Equipment use, including but not limited to Equipment cosmetics and display scratches; (c) use of non-Avaya furnished equipment, software, or facilities with Equipment (except to the extent provided in the Documentation); (d) Customer's failure to follow Avaya's installation, operation or maintenance instructions; (e) Customer's failure to permit Avaya timely access, remote or otherwise, to Equipment; or (f) failure to implement all new updates provided by Avaya. Warranties do not extend to Equipment that have been serviced or modified by a party other than by Avaya or a third party specifically authorized by Avaya to provide the service or modification. In the event Customer purchases any Third-Party Products from Avaya, Avaya provides third party products on an "AS IS" BASIS WITHOUT WARRANTIES OF ANY KIND, unless Avaya specifies otherwise. However, such Third-Party Products may carry their own warranties from their manufacturers or providers, and Avaya shall pass through to Customer any such warranties to the extent authorized. Exercise of such warranty will be directly between Customer and the relevant third-party.

6.5 Disclaimer. EXCEPT AS REFERENCED AND LIMITED IN THIS SECTION 7, NEITHER AVAYA NOR ITS AFFILIATES, LICENSOR OR SUPPLIERS MAKE ANY REPRESENTATIONS OR WARRANTIES WITH REGARD TO ANY SERVICES OR EQUIPMENT INCLUDING ANY SOFTWARE PROVIDED HEREUNDER OR OTHERWISE RELATED TO THIS AGREEMENT. AVAYA DOES NOT WARRANT UNINTERRUPTED OR ERROR FREE OPERATION OF EQUIPMENT OR THAT THE EQUIPMENT WILL PREVENT TOLL FRAUD. TO THE EXTENT PERMITTED BY APPLICABLE CANADIAN LAW, AVAYA AND ITS AFFILIATES DISCLAIM ALL IMPLIED OR STATUTORY WARRANTIES AND CONDITIONS RELATED TO THE EQUIPMENT, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES AND CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. THE WARRANTY REMEDIES EXPRESSLY REFERENCED HEREIN WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES RELATED TO THE PROFESSIONAL SERVICES AND EQUIPMENT.

7. IP OWNERSHIP

7.1 Avaya, its Affiliates, licensors and suppliers own all rights, title and interest in and to any intellectual property in the Equipment and the Professional Services, and any and all Hardware or Software provided to Customer in connection with this Agreement as well as any know-how, derivative works, inventions, processes, databases, Documentation, training materials, and any other intellectual property and any Hardware (collectively, "**Avaya Intellectual Property**"). Customer shall not copy, modify, rent, lease, sell, loan, distribute, or create derivative works of any Avaya Intellectual Property.

7.2 Marks. Nothing in this Agreement grants Customer any right to use any trade names, trademarks, service marks, logos, domain names, trade dress, or other distinctive brand features of Avaya or its subcontractors or suppliers. Customer shall not remove, obscure, or alter any proprietary rights notices, such as copyright or trademark notices, attached to or contained within Avaya Intellectual Property, Professional Services, or any software.

7.3 Feedback. Avaya welcomes customer feedback. To the extent not already owned by Avaya, Customer hereby grants Avaya a perpetual, exclusive, royalty-free, irrevocable, worldwide license to use or disclose any suggestions, enhancement requests, recommendations, proposals, ideas or other Feedback Customer provides to Avaya concerning the Services or Software, and create derivative works thereof, without restriction, compensation, obligation or liability of any kind to Customer or to any third party.

8. TERM, CANCELLATION AND TERMINATION

8.1 Term. This Agreement will commence upon acceptance of the Order by Avaya ("the **"Effective Date"**") and continue in effect for the term of the Order unless terminated pursuant to this Section.

8.2 Order Cancellation. Customer may cancel an Order prior to shipping by written notice to Avaya as follows:

8.2.1 within 24 hours of Order placement: subject to a cancellation fee of 5% of the purchase price; or

8.2.2 more than 24 hours after Order placement: subject to a cancellation fee of 10% of the purchase price.

8.2.3 Avaya may invoice for cancellation fees immediately.

8.2.4 Customer may not cancel a Hardware Order once Avaya or a third party has made the relevant Equipment, the Equipment has been shipped or the Software has been made available for download.

8.3 Order Termination. Either party may terminate Professional Services that have not been accepted in accordance with the Order, upon 45 days prior written notice. Customer will pay for Professional Services performed to the date of termination and all non-refundable or non-terminable out-of-pocket expenses Avaya incurred.

8.4 Termination for Breach. Either party may terminate this Agreement by written notice to the other party in the event of a material breach of this Agreement that is not cured within 30 days of receipt of such notice. The provisions concerning confidentiality, all limitations of liability, disclaimers and restrictions of warranty, and any terms which, by their nature, are intended to survive termination or expiration of this Agreement will survive any termination or expiration of this Agreement and any Order.

9. CONFIDENTIAL INFORMATION

9.1 Confidential Information. "Confidential Information" means either party's business and/or technical information, trade secrets, unpatented information or confidential intellectual property, financial information including pricing, discounts, forecasting or sales data, information acquired during any location visit or remote access, and other information regardless of whether in tangible or other form if marked or otherwise expressly identified in writing as confidential or reasonably understood to be confidential under the circumstances. Information communicated verbally will qualify as Confidential Information if the receiving party knew or had a reason to know that the information being disclosed was confidential information. Confidential Information does not include information which: (i) has entered the public domain except where such entry is the result of the receiving party's breach of this Agreement; (ii) was rightfully in the receiving party's possession prior to disclosure under this Agreement; or (iii) was obtained by the receiving party on a non-confidential basis from a third party who has the right to disclose such information to the receiving party. Each party acknowledges that it may receive Confidential Information from the other party in connection with this Agreement, any Order, and during the course of the parties' general business relationship. Unless stated otherwise in this Section 10 or agreed otherwise by the parties, the receiving party shall keep in trust and confidence all Confidential Information, and may use Confidential Information solely for the purpose of furtherance of the business relationship between the parties, or to exercise its rights and fulfil its obligations under this Agreement.

9.2 Authorized Disclosure. The receiving party will be authorized to disclose Confidential Information only to its employees, contractors, agents, directors, officers, professional legal advisers, Affiliates or subcontractors with a need to know and who are bound by confidentiality obligations at least as protective as the terms stated in this Section 10 (collectively, the **"Authorized Parties"**). Each party is responsible for any Authorized Party's breach of this Section 10. The receiving party may disclose Confidential Information to persons ity other than an Authorized Party upon the prior written consent of the disclosing party. Notwithstanding the foregoing, the receiving party is authorized to disclose Confidential Information as required by applicable Canadian law in accordance with a valid order issued by a court or government agency or relevant regulatory authority, provided that the receiving party, where allowed under applicable law, provides: (i) prior written notice to the disclosing party of such obligation; and (ii) the opportunity for the other party to oppose such disclosure. The confidentiality obligations of each party will survive three years following the expiration or termination of the Agreement or any Order in Canada, whichever occurs later. Upon such termination or expiration, the receiving party, upon request of the disclosing party, will cease all use of or destroy the other party's Confidential Information (including any copies thereof) in the receiving party's possession, custody, or control, provided that the receiving party may keep archival copies due to mandatory retention laws, for regulatory purposes or to enforce its rights, subject to the confidentiality obligations as stated in this Section 10. Notwithstanding the foregoing, any trade secrets disclosed hereunder shall be held in confidence by the receiving party for: (i) as long as such Confidential Information remains the disclosing party's trade secret under applicable law; or (ii) until such Confidential Information falls under one of the exceptions to the confidentiality obligations specified in this Section.

10. LIMITATION OF LIABILITY

THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THE ORDER (EXCLUDING ANY LIABILITY TO PAY THE FEES DUE FOR PRODUCTS AND SERVICES) WILL NOT EXCEED AN AMOUNT EQUAL TO THE GREATER OF THE TOTAL AMOUNT OF ALL FEES PAID OR PAYABLE UNDER THE ORDER IN THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE LAST EVENT GIVING RISE TO THE CLAIM OR \$50,000.00 USD. NEITHER PARTY NOR ITS RESPECTIVE LICENSORS OR SUPPLIERS HAVE ANY LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, STATUTORY, INDIRECT OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS OR REVENUE, LOSS OR CORRUPTION OF DATA, TOLL FRAUD, COST OF COVER, COST OF SUBSTITUTE GOODS OR COST OF SUBSTITUTE PERFORMANCE. THE EXCLUSIONS OF LIABILITY AND THE CAP ON AGGREGATE LIABILITY IN THIS SECTION 10 WILL APPLY TO ANY DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE TO THE PARTIES FAIL OF THEIR ESSENTIAL PURPOSE. HOWEVER, THE EXCLUSIONS OF LIABILITY AND THE LIMIT ON AGGREGATE LIABILITY DO NOT APPLY IN CASES OF WILLFUL MISCONDUCT, PERSONAL INJURY, OR BREACHES OF AVAYA'S LICENSE RESTRICTIONS. THE LIMIT ON AGGREGATE LIABILITY WILL NOT APPLY TO EITHER PARTY'S INDEMNIFICATION OBLIGATIONS OR ITS BREACH OF SUCH OBLIGATIONS UNDER THIS AGREEMENT.

11. GOVERNING LAW, DISPUTE RESOLUTION AND ORDER OF PRECEDENCE

11.1 Governing Law. This Agreement and any disputes, claim or controversy arising out of or relating to this Agreement (“**Dispute**”) will be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein, excluding both conflict of law principles and the United Nations Convention on Contracts for International Sale of Goods.

11.2 Dispute Resolution. In the event of any Dispute, the disputing party shall give the other party written notice of the Dispute in accordance with the notice provision of this Agreement. The parties will attempt in good faith to resolve each Dispute within 30 days, or such longer period as the parties may mutually agree, following the delivery of such notice, by negotiations between designated representatives of the parties who have dispute resolution authority. If the parties are not able to resolve the Dispute within the period as set forth above then either party may bring an action or proceeding as set forth in Section 12.3 or 12.4, as applicable.

11.3 Choice of Forum. For any Dispute arising in Canada or based upon an alleged breach committed in Canada, then either party may bring an action or proceeding solely in the Ontario Superior Court of Justice. Each party submits to the exclusive jurisdiction of those courts, including their appellate courts, for the purpose of all actions and proceedings arising under this Section 12.3 .

11.4 Undisputed Invoices. Nothing in Section 12 will be construed to preclude Avaya from instituting a proceeding for payment of undisputed invoices from any court of competent jurisdiction.

11.5 Injunctive Relief. Nothing in Section 12 will be construed to preclude either party from seeking provisional remedies, including but not limited to temporary restraining orders and preliminary injunctions from any court of competent jurisdiction in order to protect its rights at any time, including its rights pending arbitration, at any time. The parties agree that the arbitration provision in Section 10.4 may be enforced by injunction or other equitable order, and no bond or security of any kind will be required with respect to any such injunction or order

11.6 Time Limit. Actions on Disputes between the parties must be brought in accordance with this Section within two (2) years after the cause of action arises.

11.7 Order of Precedence. In the event of conflict among this Agreement, the Order and/or Service Description, the order of precedence is: this Agreement; (ii) Service Description; (iii) Order.

12. MISCELLANEOUS

12.1 Avaya will maintain all necessary licenses and consents and comply with all relevant laws applicable to the provision of the Professional Services.

12.2 Assignment & Subcontractors. Avaya may assign this Agreement and any Order under this Agreement to any of its Affiliates or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under this Agreement. Any other assignment of this Agreement or any rights or obligations under this Agreement without the express written consent of the other party will be invalid. Avaya may subcontract any or all of its obligations under this Agreement but will retain responsibility for the work. Avaya is an independent contractor, and no partnership, joint venture, or agency relationship exists between the parties. Each party will be responsible for paying its own employees, including employment related taxes and insurance.

12.3 Force Majeure. Neither party will be liable for any delay or failure in performance to the extent the delay or failure is caused by events beyond the party's reasonable control, including without limitation, fire, flood, Act of God, explosion, terroristic acts, hacking, malware, ransomware, business interruption or data loss caused by malicious or criminal act, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, and inability to secure materials or transportation facilities.

12.4 Notices. Legal notices under this Agreement will be sent to Avaya [Canada Corp. Attn: Law Dept. 515 Legget Drive, Suite 600, Kanata, Ontario K2K 3G4 Canada](#) Email: at lglnoticescomm@avaya.com and (in addition) to the official registered address in the respective country. Legal notices under this Agreement to Customer will be addressed to the address in the Service Description and/or Order, or, if not specified, to the Customer's registered address.

12.5 Entire Agreement. This Agreement (and the applicable Service Description and/or the Order) constitute the entire understanding of the parties with respect to the subject matter of and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between the parties relating to that subject matter and will not be contradicted or supplemented by any prior course of dealing between the parties. Any modifications or amendments to this Agreement must be in writing physically or electronically and signed by both parties. If any provision of this Agreement is determined to be unenforceable or invalid by court decision, this Agreement will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law. The failure of either party to assert any of its rights under this Agreement including, but not limited to, the right to terminate this Agreement in the event of breach or default by the other party, will not be deemed to constitute a waiver by that party of its right to enforce each and every provision of the Agreement in accordance with their terms.

END OF PROFESSIONAL SERVICES AND EQUIPMENT TERMS