



Actify Agreements

2019 – Version 1.0.1

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www.actify.com

Audience

This document contains the agreements supporting customer's purchase of right-to-use Actify application licenses and/or professional services. This document is not to be shared with any other parties, most notably competitors to Actify or others who may bid on a similar service. If you do not agree to abide by this, destroy this and any other electronic or paper copies in your possession.



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Attachment A – General Terms and Conditions

In consideration of the mutual promises between CUSTOMER (“Customer”) and Actify, Inc. (“Actify”) and upon the General Terms and Conditions (“GTC”) set forth below, the parties agree as follows:

1. Relationship of Parties

- 1.1. *Independent Contractors.* Each party will be and act as an independent contractor and not as an agent or partner of, or joint Venture with, the other party for any purpose related to this Agreement or the transactions contemplated by this Agreement, and neither party by virtue of this Agreement will have any right, power or authority to act or create any obligation, expressed or implied, on behalf of the other party.
- 1.2. *Contact Person.* Each party will appoint in writing an employee or agent of such party to act as the “Contact Person” for all communication between the parties related to the Service. The Contact Person will be responsible for monitoring the status of the Service and will schedule regular meetings with both technical and management personnel of each party to review the status of the Service. Either party may change its Contact Person upon written notice to the other.
- 1.3. *Non-solicitation.* During the term of this Agreement and for three years after its expiration or termination, neither party shall without the prior written consent of the other party, solicit employment as an employee, independent contractor, or consultant to any employee of the other party.

2. General Fees and Payments

- 2.1. *Currency:* All payments in this proposal shall be made in United States dollars, at Actify’s address as indicated in this Agreement or at such other address as Actify may from time to time indicate by proper notice hereunder.
- 2.2. *Expenses.* Customer shall reimburse all reasonable travel and other related expenses incurred by Actify in the delivery of the Service.
- 2.3. *Taxes.* Customer also agrees to pay or reimburse Actify for all federal, state, dominion, provincial or local sales, use, personal property, excise or other taxes, fees or duties arising out of this Agreement or the transactions contemplated by this Agreement (other than taxes on the net income of Actify).
- 2.4. *Interest and further costs.* Customer shall pay Actify one and one half percent (1.5%) per month or at the maximum rate permitted by law, whichever is less, on all overdue and unpaid invoices until paid in full. Customer shall further be responsible for all costs incurred by Actify in connection with any claim made by Actify in order to recover payment of Customer’s account, including without limitation, all consulting fees and legal costs.
- 2.5. *Invoices.* Service will commence as soon as practical following Actify’s receipt and acceptance of a signed copy of this Agreement or a purchase order or other written authorization of the Service referencing this proposal. No terms, provisions or conditions of any purchase order or other business form or written authorization used by Customer will have an effect on the rights, duties or obligations of the parties under, or otherwise modify, this Agreement, regardless of any failure of Actify to object to such terms, provisions, or conditions.

3. Term and Termination

- 3.1. *Term.* This Agreement will be for an “Initial Term” which shall commence on the “Effective Date” (as defined in Sales Quote) and continue for the number of years specified on the Actify Sales Quote. In the case no termination date is specified on the Actify Sales Quote then the agreement will revert to an annual term from the Effective Date.
- 3.2. *Renewal Term.* This Agreement will automatically renew (the “Renewal Term”) at the then current fees at the end of the Initial Term for the same period as the Initial Term, unless customer provides Actify with written notice of termination at least 30 days before the end of the Initial Term or the Renewal Term.
- 3.3. *Termination.*
 - 3.3.1. *Independent Agreement:* The term or termination of this agreement shall have no effect on the term or termination of any service agreements between Actify and Customer whether or not those were signed under this Agreement.
 - 3.3.2. *Early Termination:* Either party shall have the right, in its sole discretion, to terminate this Agreement without cause upon written notice to the other party delivered at least thirty (30) days prior to the effective date of the termination, provided that no such termination shall effect any fees payable under the then current agreement term.
 - 3.3.3. *Agreement Breach:* If you fail to fulfill any of your material obligations under this Agreement, Actify and/or its licensors may pursue all available legal remedies to enforce this Agreement, and Actify may, at any time after your default of this Agreement, terminate this Agreement and all licenses and rights granted to you under this Agreement. You agree that Actify’s licensors referenced in the Software are third-party beneficiaries of this Agreement, and may enforce this Agreement as it relates to their

intellectual property. You further agree that, if Actify terminates this Agreement for your default, you will, within thirty (30) days after any such termination, deliver to Actify or render unusable all Software originally provided to you hereunder and any copies thereof embodied in any medium.

3.3.4. *Business Termination:* Either party shall have the right to terminate this Agreement in the event that the other party is declared insolvent, makes a general assignment for the benefit of creditors or a petition for bankruptcy, reorganization, dissolution or liquidation is filed by or against it, provided that no such termination shall effect any fees payable under the then current agreement term.

3.3.5. *Provisions Survive:* All provisions that by their nature are intended to survive any termination of this agreement shall survive.

3.3.6. *Payments Due:* Any payment due shall remain payable past termination to the end of the agreed to payment period.

4. Ownership of Work Product

4.1. *Creations.* All materials, documentation, or any software programs (including Customizations), source and object code, specifications, designs, processes, techniques, concepts, improvements, discoveries, and inventions made or developed in connection with the Service (collectively, "Creations") will be the sole and exclusive property of Actify. Customer shall not decompile, modify, translate, reproduce, edit, or resell Actify's Creations, promotional literature, training materials, documentation, advertising artwork, the names and/or package design of the software application, or any other materials without Actify's prior written consent. All modifications, translations, reproductions, and/or edited versions of those items will become the exclusive property of Actify.

4.2. *License.* Customer will be entitled to use the Creations in object code format only and only to the extent necessary to integrate it into its own product, and to distribute the software (within a territory) as a plug-in for the product, but is not authorized to loan, distribute or sell Creations to third parties or subsidiaries unless specified in Sales Quote.

4.2.1. *Perpetual License.* Customer will be entitled to use the licensed software and if maintenance is purchased then customer can download all software updates and receive technical support. After maintenance expires, the customer can choose to remain with the last version downloaded or to purchase annual maintenance (Updates & Support), for 20% of the license's list price. If annual maintenance lapses, the customer may incur a reactivation fee up to three times the annual maintenance rate to restart annual updates and support.

4.2.2. *Term License.* (a.k.a., lease or subscription license) Customer will be entitled to use the licensed software for a specified term, and be entitled download all updates to the software and to receive technical support. Once the specified term ends, the software will no longer function unless a term extension has been executed.

5. Limited Warranty and Limitation of Liability

5.1. *Warranty.* Except as set forth above, Actify makes no warranties, whether express, implied, or statutory, regarding or relating to any Service, materials, documentation, or any software programs furnished or provided to Customer under this Agreement.

5.2. *Liability.* In no event will Actify be liable for any loss of profits, loss of use, business interruption, loss of data, cost of cover, or indirect, special incidental, or consequential damages of any kind in connection with or arising out of the furnishing, performance or use of the materials, documentation, or any software programs, Products or the Service, whether alleged as a breach of contract or tortious conduct, including negligence, even if Actify has been advised of the possibility of such damages. In addition, Actify will not be liable for any damages caused by delay in deliver or furnishing the Service, materials, documentation, or any software programs.

5.3. *Indemnification.* Customer shall defend, indemnify and hold Actify harmless from and against any claim, demand, loss, adverse judgment or expense based directly or indirectly on or related to Customer's use, distribution or sale of Creations, including without limitation any use of the Creations by Customer or Customer's end user customers as permitted herein.

5.4. *Breach.* No action arising out of any breach or claimed breach of this Agreement of the transactions contemplated by this Agreement may be brought by either party more than one (1) year after the cause of action has accrued. For purposes of this Agreement, a cause of action will be deemed to have accrued when a party knew or reasonably should have known of the breach or claimed breach.

5.5. *Representation.* No employee, agent, representative, or affiliate of Actify has authority to bind Actify to any oral representations or warranty concerning the Service, materials, documentation, or any software programs. Any written representation or warranty not expressly contained in this Agreement will not be enforceable.

5.6. *Waiver.* Any waiver of the provisions of this Agreement or of a party's rights or remedies under this Agreement must be in writing to be effective. Failure, neglect, or delay by a party to enforce the provisions of this Agreement or its rights or remedies at any time, will not be construed and will not be deemed to be a waiver of such party's rights under this Agreement and will not in any way affect the validity of the whole or any part of this Agreement or prejudice such party's right to take subsequent action. Except as expressly stated in this

Agreement, no exercise or enforcement by either party of any right or remedy under this Agreement will preclude the enforcement by such party of any other right or remedy under this Agreement or that such party is entitled by law to enforce.

- 5.7. *Severability*. If any term, condition, or provision in this Agreement is found to be invalid, unlawful or unenforceable to any extent, the parties shall endeavor in good faith to agree to such amendments that will preserve, as far as possible, the intentions expressed in this Agreement. If the parties fail to agree on such an amendment, such invalid term, condition or provision will be severed from the remaining terms, conditions and provisions, which will continue to be valid and enforceable to the fullest extent permitted by law.
- 5.8. *Assignment*. Neither this Agreement nor any rights under this Agreement may be assigned or otherwise transferred by Customer, in whole or in part, whether voluntary or by operation of law, including by way of sale of assets, merger or consolidation, without the prior written consent of Actify, which consent will not be unreasonably withheld. Subject to the foregoing, this Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and assigns.
- 5.9. *Force Majeure*. Either party shall be excused from any delay or failure in performance hereunder caused by reason of any occurrence beyond its reasonable control or contingency beyond its reasonable control, including but not limited to, acts of God, earthquake, labor disputes and strikes, riots, war, and governmental requirements. The obligations and rights of the party so excused shall be extended on a day-to-day basis for the period of time equal to that of the underlying cause of the delay as long as such delay remains beyond such party's reasonable control or a period of three (3) days, whichever is shorter.
- 5.10. *Governing Law*. This Agreement shall be deemed to have been made under the laws of the State of California.
6. *Notices*. Any notice required or permitted under the terms of this Agreement or required by law shall (unless otherwise provided) be in writing and shall be delivered in person, sent by registered mail or air mail as appropriate, properly posted and fully prepaid in an envelope properly addressed, or shall be sent by fax to the respective parties as documented in this Agreement or to such other address or fax number as either party may be notified of by the other party. Any such notice shall be in the English language, unless otherwise specified in this Agreement, and shall be considered to have been given at the time of actual delivery in person or, if sent by fax, at the time mentioned on the transmission result report, or in any other event within fourteen days after it was mailed in the manner specified above.
7. *Confidential Information*. In the interests of promoting a relationship between the Customer and Actify, it may be necessary to disclose to Customer, information that Actify considers to be confidential or proprietary. Actify is willing to disclose such information to the Customer upon the terms set forth below:
 - 7.1. "Confidential Information" shall mean all information relating to the Service, materials, documentation, or any software programs, which are owned or controlled by Actify. Confidential Information may include but is not limited to, design methods, data, processes, formulas, and sales and marketing information and does not include information that (1) the Customer can show is in its possession at the time of disclosure without binder of secrecy, (2) is then or later becomes part of public knowledge or literature other than through a wrongful act, by the Customer or (3) was thereafter rightfully received by the Customer from a third party without binder of secrecy.
 - 7.2. Confidential Information disclosed both orally or in writing, to the Customer, either directly or indirectly, shall be held in strict confidence by the Customer. If oral, such Confidential Information will be confirmed in writing within (15) fifteen-days following such disclosure.
 - 7.3. The Customer further agrees not to disclose Confidential Information to third parties not already under a like binder of secrecy from Actify and not to use the same except as explicitly authorized by Actify.
 - 7.4. Upon written request by Actify the Customer shall promptly return all confidential Information to Actify.
 - 7.5. This Agreement shall not be construed to grant Customer any license or other rights except as specifically set forth herein.
 - 7.6. Notwithstanding anything to the contrary in the previous paragraphs, Confidential Information may be disclosed by the Customer to those of its employees (excluding employees of affiliated companies), who require knowledge thereof in connection with their duties in conducting the aforesaid purpose of this Agreement, provided the Customer informs all such employees of the terms of this Agreement and their duties hereunder and obtains their consent hereto as a condition for their receiving Confidential Information.
 - 7.7. The above stated confidentiality and non-disclosure obligations shall remain in effect for a period of five years from the date of this Agreement.
8. *Entire Agreement*. This Agreement (including the Proposal, Sections, and any addenda hereto signed by both parties) contains the entire Agreement of the parties with respect to the subject matter of this Agreement and supersedes all previous communications, representations, understandings and agreements, either oral or written, between the parties with respect to said subject matter.
9. *Amendments to this Agreement*. This Agreement may not be amended, except by a written amendment signed by both parties.

Attachment B – Software License Agreement

This SOFTWARE LICENSE AGREEMENT (“SLA”) is entered into on the “Effective Date” (as defined In Sales Quote) by and between CUSTOMER (“Customer”) and Actify, Inc. (“Actify”), and describes the terms and conditions pursuant to which Actify will provide Software License to Customer subject to the General Terms and Conditions described in Attachment A.

- 1. Grant of Limited License. Software Use Restrictions.*** In consideration for your acceptance of the terms and conditions of this Agreement and your payment of the license fees described in our invoice, Actify grants to you (or, if you will use the Software as an employee of a company, your employer) a non-transferable and non-exclusive right to use and execute the Software on a single computer, without right to sublicense or distribute the Software (except as provided in SLA Section 3 below). Under no circumstance may you store, use or allow the use of the Software in any manner on more than one computer at one time. However, you may use remote access technologies, such as the Remote Desktop features in Microsoft Windows or NetMeeting, to access and use your licensed copy of the Software, provided that only the primary user of the device hosting the remote desktop session accesses and uses the Software with a remote access device. These remote desktop rights do not permit you to use the Software on both the device hosting the remote desktop session and the access device at the same time. You may also permit any device to access and use your licensed copy of the Software for the purpose of providing you with technical support and maintenance services. You agree that Actify has the right to audit to verify that the number of computers running the Software corresponds with the number of licenses paid for. You agree that you will not modify, reverse engineer, decompile or disassemble any portion of the Software.
- 2. Duplication Restrictions.*** In order to affect your license rights hereunder, you may install the Software by duplicating it onto the hard disk drive or into the CPU memory of a computer for use thereon, and you may make full or partial copies of the Software, but only as necessary for backup or archival purposes or for purposes of distribution pursuant to SLA Section 3 below. You agree that (i) your use and possession of such copies shall be solely under the terms and conditions of this Agreement, and (ii) you shall place the same proprietary and copyright notices and legends on all such copies as included by Actify on any media containing an authorized copy of the Software originally provided by Actify.
- 3. Distribution of the Software to Others.*** You may not duplicate the Software except for backup and archival purposes. You may not distribute the Software to others unless (i) you transfer all your rights hereunder to the recipient; (ii) the recipient agrees to abide by all of the terms of this license agreement; and (iii) you do not retain any copy of the Software or its documentation. In any event, you may not make copies of the Software for distribution to others or allow copies of the Software to be made by someone else.
- 4. Transfer Restrictions.*** Except as expressly provided in SLA Section 3 above, you may not transfer the Software and/or assign this License to any third party. If you attempt to transfer or assign this License—such transfer or assignment will be void and without effect.
- 5. Export Restrictions.*** You may not export or re-export any Software or other technology received under this Agreement except in full compliance with all United States and other applicable laws and regulations. In particular, none of such Software or technology may be exported or re-exported into (or to a national or resident of) any country to which the U.S. embargoes goods, or to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders.
- 6. Other Restrictions.*** The Software may not be used to create .3D files as part of an ASP (application service provider) service or any other online service.
- 7. Publications and Lectures.*** The use of the Software in data manipulation for any kind of publication or lecture should receive a full acknowledgement.
- 8. Privacy Issues.*** Actify requires that you activate this product in order to verify that you are installing an authentic Actify product. When you activate this product, you are not required to send any personal information to Actify. Activation is completely anonymous. During activation, the product creates a unique hardware identifier that represents the configuration of the computer at the time of activation. The hardware identifier does not include any of your personal information, information about software or data that may reside on your computer, or information about the specific make or model of your computer. The hardware identification only identifies the computer for the sole purpose of activation. The activation technology in the product can detect and tolerate changes to your computer configuration. Minor upgrades will not require re-activation. If you replace your hard drive or your motherboard you may be required to activate the product again. When activating over the Internet or telephone, the following information is transmitted to Actify solely for the purpose of completing activation: the hardware identifier, an activation request code, the product serial number, and the name, version, and language of the product and operating system. This anonymous information is only used to generate a license for your product. For more details, please visit: www.actify.com. After activation you may also choose to register your product. The product registration process is a separate and distinct process from activation. If you choose to register your product, the information that you provide will be securely stored by Actify. Actify does not allow the selling of any user-provided information to third parties. Actify respects the rights users give us when opting to receive e-mail communications and enforce internal policies to preserve those rights. It is our objective to retain the long-term ability to continue to communicate with our users. For more detailed information, please visit: www.actify.com. If you believe that Actify has not adhered to these privacy principles, please notify us by postal mail.

Attachment C – Professional Service Agreement

This PROFESSIONAL SERVICES AGREEMENT (“PSA”) is entered into on the “Effective Date” (as defined In Sales Quote) by and between CUSTOMER (“Customer”) and Actify, Inc. (“Actify”), and describes the terms and conditions pursuant to which Actify will provide Professional Service (“Service”) to Customer subject to the General Terms and Conditions described in Attachment A. For clarity, the terms of this Professional Services agreement are not applicable to the Term License Agreement (Product Subscription). Where there is conflict, the General Terms and Conditions shall take precedence.

1. Scope of Service

- 1.1. *Service.* Actify shall provide the Service described in the attached proposal, as amended from time to time by agreement of the parties.
- 1.2. *Manner of Performance.* Actify will retain the sole and exclusive right to control or direct the manner or means by which the Service are delivered, developed or performed and may subcontract or assign any or all of its obligations and rights under this PSA. Any such subcontract or assignment is subject to Customer’s consent, which consent shall not be unreasonably withheld or delayed.

2. Customer’s Duties and Responsibilities

- 2.1. *Data and Information.* Customer shall make available in a timely manner at no charge to Actify all technical data, computer facilities, programs, files, documentation, test data, sample output, or other information and resources required by Actify for the delivery of the Service. Customer will be responsible for, and assumes the risk of any problems resulting from, the content, accuracy, completeness and consistency of all such data, materials and information supplied by Customer.
- 2.2. *Equipment.* Customer shall provide, at no charge to Actify, office space and equipment (such as copiers, fax machines and modems) as Actify reasonably requires for performing the Service on-site.
- 2.3. *Tasks.* Tasks that are primarily the responsibility of Customer’s personnel will remain Customer’s responsibility and will remain under Customer’s supervision, management and control, even if Actify assists Customer in performing such tasks.

3. PSA Fees and Payments

- 3.1. *PSA Fees.* Customer shall pay Actify the fees and according to the payment terms stated in the proposal. If no payment terms are stated, then the customer shall pay on a TIME AND MATERIALS basis for the Service in accordance with the fees set forth in the signed Sales Order document attached hereto. Actify will invoice Customer every two weeks as Services are performed. All payments for fees and expenses must be made within (30) thirty-days of the date of invoice. Unless documented otherwise, Professional Services are sold in one-day blocks (8-hour units). On-site work is invoiced by the hour with an 8-hour minimum per day. If more than 8-hours are delivered, then that time is added to the 8-hour minimum. If less than 8-hours are required on-site, the client is invoiced for the full 8-hour minimum. Off-site work is invoiced on an hourly basis.