



**UTILIWARE CONSULTING  
SERVICES AGREEMENT**

THIS SERVER HOSTING SERVICES AGREEMENT (hereinafter "Agreement"), is made and entered into as of \_\_\_\_\_ (hereinafter "Effective Date") by and between \_\_\_\_\_ (hereinafter "CUSTOMER"), having offices at \_\_\_\_\_ and, Utiliware Corporation (hereinafter "UTILIWARE") having offices at 3830 Valley Center Drive, Suite 705-295, San Diego, California 92130.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, UTILIWARE and CUSTOMER (hereinafter collectively the "Parties," or individually referred to as "CUSTOMER" and "UTILIWARE ") hereby agree as follows:

- 1. **SERVICES PERFORMED.** UTILIWARE agrees to perform the following services identified in section 2 for CUSTOMER. All services are billing in hourly intervals.
- 2. **FEE SCHEDULE.** Compensated shall be paid based on the schedule below.

a. **Services.**

SERVICE TYPE	RATE (\$USD PER HOUR)
IT Consulting	\$125

- b. **Rate Multiplier.** A discount is available for software development and/or quality assurance services when a CUSTOMER commits to a 12 month term and a monthly hours as follows:

BUSINESS HOURS	OFF BUSINESS HOURS	HOLIDAY
8:00AM – 6:00PM	6:00 PM – 8:00AM	US Government Holidays
1X	1.5X	2X

- i. Time Zone is Pacific Standard Time (PST).
- ii. Final rate is calculated by multiplying service rate time rate multiplier.

- 3. **INDEPENDENT CONTRACTOR.** UTILIWARE is an independent contractor, and neither UTILIWARE nor UTILIWARE’s staff is, or shall be deemed, CUSTOMER’s employees. In its capacity as an independent contractor, UTILIWARE agrees and represents, and CUSTOMER agrees, as follows:

- a. UTILIWARE has the right to perform services for others during the term of this Agreement subject to non-competition provisions set out in this Agreement, if any.

- b. UTILIWARE has the sole right to control and direct the means, manner and method by which the services required by this Agreement will be performed.
  - c. The services required by this Agreement shall be performed by UTILIWARE, or UTILIWARE's staff, and CUSTOMER shall not be required to hire, supervise or pay any assistants to help UTILIWARE.
  - d. Neither UTILIWARE nor UTILIWARE's staff shall be required to devote full-time to the performance of the services required by this Agreement.
  - e. CUSTOMER shall not provide insurance coverage of any kind for UTILIWARE or UTILIWARE's staff.
  - f. CUSTOMER shall not withhold from UTILIWARE's compensation any amount that would normally be withheld from an employee's pay.
- 4. INTELLECTUAL PROPERTY OWNERSHIP.** UTILIWARE assigns to CUSTOMER its entire right, title and interest in anything created or developed by UTILIWARE for CUSTOMER under this Agreement ("Work Product") including all patents, copyrights, trade secrets and other proprietary rights. This assignment is conditioned upon full payment of the compensation due UTILIWARE under this Agreement.
- 5. CONFIDENTIALITY.** During the term of the Agreement, UTILIWARE will use reasonable care to prevent the unauthorized use or dissemination of CUSTOMER's confidential information. Reasonable care means at least the same degree of care UTILIWARE uses to protect its own confidential information from unauthorized disclosure.
- Confidential information is limited to information clearly marked as confidential, or disclosed orally and summarized and identified as confidential in a writing delivered to UTILIWARE within 15 days of disclosure.
- Confidential information does not include information that:
- a. UTILIWARE knew before CUSTOMER disclosed it
  - b. is or becomes public knowledge through no fault of UTILIWARE
  - c. UTILIWARE obtains from sources other than CUSTOMER who owe no duty of confidentiality to CUSTOMER, or
  - d. UTILIWARE independently develops.
- 6. LIMITATION ON UTILIWARE'S LIABILITY TO CUSTOMER.**
- a. In no event shall UTILIWARE be liable to CUSTOMER for lost profits of CUSTOMER, or special, incidental or consequential damages (even if UTILIWARE has been advised of the possibility of such damages).
  - b. UTILIWARE's total liability under this Agreement for damages, cost and expenses, regardless of cause, shall not exceed the current monthly fee paid to UTILIWARE by CUSTOMER under this Agreement when claim was made.
  - c. CUSTOMER shall indemnify UTILIWARE against all claims, liabilities and costs, including reasonable attorney fees, or defending any third party claim or suit, other than for infringement of intellectual property rights, arising out of or in connection with CUSTOMER's performance under this Agreement. UTILIWARE shall promptly notify CUSTOMER in writing of such claim or suit and CUSTOMER shall have the right to fully control the defense and any settlement of the claim or suit.

7. **FORCE MAJUERE.** UTILIWARE shall not be liable for and is excused from any failure to deliver or perform or delay in delivery or performance, due to causes beyond its reasonable control or due to failure of Client to provide sufficient information, resources, cooperation or personnel to support the project. The period of performance shall be extended to such extent as may be appropriate after the cause of the delay or non-performance has been removed.
8. **TAXES.** The charges included here do not include taxes. If UTILIWARE is required to pay any federal, state or local sales, use, property or value added taxes based on the services provided under this Agreement, the taxes shall be separately billed to CUSTOMER. UTILIWARE shall not pay any interest or penalties incurred due to late payment or nonpayment of such taxes by CUSTOMER.
9. **CONTRACT CHANGES.** CUSTOMER and UTILIWARE recognize that:
- UTILIWARE 's original cost and time estimates may be too low due to unforeseen events, or to factors unknown to UTILIWARE when this Agreement was made
  - CUSTOMER may desire a mid-project change in UTILIWARE's services that would add time and cost to the project and possibly inconvenience UTILIWARE, or
  - Other provisions of this Agreement may be difficult to carry out due to unforeseen circumstances.

If any intended changes or any other events beyond the parties' control require adjustments to this Agreement, the parties shall make a good faith effort to agree on all necessary particulars. Such agreements shall be put in writing, signed by the parties and added to this Agreement.

## 10. TERM, TERMINATION AND RENEWAL

- Term.** The term of this Agreement is variable and can be on a one time, monthly or annual basis. **The term of the Agreement will be determined on the SOF and will be initiated on the date CUSTOMER signs the Service Agreement.** Rates will vary depending upon the term of the Agreement. Long-term service orders are considered to be anything over six (6) months. Once a long-term Agreement has expired, CUSTOMER shall continue its service on a month-to-month basis upon the terms and conditions specified herein, or renew its Agreement, unless terminated by either CUSTOMER or UTILIWARE upon thirty (30) days' prior written notice.
- Termination.** Monthly service may be canceled by providing a written notification thirty (30) days in advance. Only a written request to terminate service relieves CUSTOMER from the obligation to pay charges at the conclusion of thirty (30) days. Termination of long-term service (six (6) months – sixty (60) months) requires written notification from CUSTOMER thirty (30) days before the Agreement ends. In the event that CUSTOMER terminates Service prior to the expiration of the term specified on the SOF, CUSTOMER is liable for 100% of the monthly charges multiplied by the number of months remaining in the Agreement.

- c. **Renewal.** Monthly service is automatically renewed every month, unless terminated by either CUSTOMER or UTILIWARE upon thirty (30) days' prior written notice.

## 11. PAYMENT

- a. **Payment Due.** CUSTOMER will be invoiced biweekly. Payment in full is due when invoice is send via email, or the next business day, thereafter. If payment is not received within 30 days, a service charge (2% of the total amount of the invoice due) will be added to the invoice. Thereafter total payment is due in full before any new work can be started.
- b. **Passing Checks on Insufficient Funds.** In the event that CUSTOMER passes a check on insufficient funds to UTILIWARE, UTILIWARE shall assess a twenty-five dollar (\$25.00) charge to CUSTOMER for CUSTOMER'S first check passed on insufficient funds. In the event that CUSTOMER passes subsequent checks on insufficient funds to UTILIWARE, UTILIWARE shall assess a thirty-five dollar (\$35.00) charge to CUSTOMER for each subsequent check passed on insufficient funds. As used in this paragraph, to "pass a check on insufficient funds" means to make, utter, draw or deliver any check, draft, or order for the payment of money upon any bank, depository, person, firm or corporation that refuses to honor the check, draft, or order for any of the following reasons: (1) Lack of funds or credit in the account to pay the check; (2) The person or entity who wrote the check does not have an account with the drawee; or (3) The person or entity who wrote the check instructed the drawee to stop payment on the check.

## 12. INDEMNIFICATION AND HOLD HARMLESS

As a customer of UTILIWARE, and as a user of UTILIWARE'S services, the CUSTOMER agrees to indemnify and to hold harmless UTILIWARE and its officers, directors, employees, affiliates and agents from and against any liability, loss, claim, damage or expense (including legal fees and expenses) as a result of a breach by CUSTOMER of any of its obligations under this Agreement or as a result of CUSTOMER'S negligence, misrepresentations, errors and omissions, fraud or criminal acts. UTILIWARE shall not be liable, either in contract or in tort, for prosecution from unauthorized access of its customers transmission facilities or customer-owned premise equipment, or for unauthorized access to or alteration, theft or destruction of a customer's data files, programs, or information, through accident, fraudulent means or devices, or any other method, even should such access occur as a result of UTILIWARE negligence. UTILIWARE shall not be in any way responsible for claims or damages caused by a customer, through fault, negligence or failure to perform customer's responsibilities, claims against a customer by any other party, any act or omission of any party furnishing services and or products; or for the installation and/or removal of any and all equipment supplied by any service provider or UTILIWARE.

## 13. DISCLAIMER OF WARRANTIES

UTILIWARE makes no warranties, express or implied, including, but not limited to, any warranties or merchantability or fitness for any particular purpose. Further, CUSTOMER agrees and acknowledges that no employee, agent, representative or affiliate of UTILIWARE

has authority to bind UTILIWARE to any oral representations or warranty concerning Services provided to CUSTOMER under this Agreement.

#### 14. HIRING OF UTILIWARE PERSONNEL

- a. **UTILIWARE'S Investment in Personnel.** CUSTOMER acknowledges that UTILIWARE has made significant investments of time and money identifying and training the Personnel who are or may perform Services on behalf of CUSTOMER. CUSTOMER further acknowledges that CUSTOMER will benefit from UTILIWARE'S investment through its provision of Personnel. CUSTOMER also acknowledges that UTILIWARE would be harmed and would lose significant investments made by it if CUSTOMER were to directly hire UTILIWARE'S Personnel after they have been introduced to CUSTOMER by UTILIWARE, and that in such event, CUSTOMER would be enjoying all the benefits of UTILIWARE'S prior investments of time and money in said Personnel, without having made any of such investments.
- b. **No Solicitation.** In view of UTILIWARE 'S significant investments of time and money in its Personnel, and specifically in the Personnel who are to provide Services to CUSTOMER, CUSTOMER agrees that it shall not, directly or indirectly, solicit, recruit or seek to hire any Personnel of UTILIWARE who are or have been assigned to perform work for CUSTOMER under this Agreement, until one (1) year after the termination of this Agreement.
- c. **Hiring Fee.** CUSTOMER agrees that if any Personnel of UTILIWARE, who are or have been assigned to perform work for CUSTOMER under this Agreement, are the initiating party in seeking employment with CUSTOMER, and if CUSTOMER hires such Personnel, CUSTOMER shall provided UTILIWARE with written notice of the fact of its hiring of such Personnel within thirty (30) days of such hiring. In order to compensate UTILIWARE for losses of investments of time and money in such Personnel who are hired by CUSTOMER, and to help UTILIWARE defray the expenses that shall be incurred in replacing such Personnel who are hired by CUSTOMER, within thirty (30) days of the date of such hiring, CUSTOMER shall pay UTILIWARE an amount equal to one hundred percent (100%) of the total first year compensation CUSTOMER pays such Personnel. CUSTOMER specifically acknowledges and agrees that the fee contemplated by this Section is reasonable and necessary to protect UTILIWARE'S investments and to defray costs associated with replacing any such Personnel who are hired by CUSTOMER.

#### 15. MISCELLANEOUS

- a. **Governing Law, Forum and Place of Performance.** This Agreement shall be governed in all respects by the laws of the United States of America and the State of California without regard to conflicts of law principles. All disputes arising under this Agreement shall be brought in Superior Court of the State of California in San Diego County or the United States District Court for the Southern District Court of California in San Diego, California, as permitted by law. The Superior Court of San Diego County and the United States District Court for the Southern District of California in San Diego, California shall each have non-exclusive jurisdiction over

disputes under this Agreement. CUSTOMER consents to the personnel jurisdiction of the above courts. CUSTOMER further agrees that the place of the performance of this Agreement shall be San Diego, California.

- b. **Attorneys' Fees.** In the event any proceeding or lawsuit is brought by a Party to this Agreement against the other, in connection with this Agreement, the prevailing party in such proceeding shall be entitled to receive its costs, expert witness fees and reasonable attorneys' fees, including costs and reasonable attorneys' fees on appeal.
- c. **No Agency.** The Parties are and shall be independent contractors to one another, and nothing herein shall be deemed to cause this Agreement to create an agency, partnership, or joint venture between the Parties. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between CUSTOMER and either UTILIWARE or any employee or agent of UTILIWARE.
- d. **Severability.** In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.
- e. **Headings.** The section headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or extent of such section or in any way affect this Agreement.
- f. **Counterparts.** This Agreement may be executed simultaneously in two or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument.
- g. **Language.** This Agreement is in the English language only, which language shall be controlling in all respect, and all versions of this Agreement in any other language shall be for accommodation only and shall not be binding on the Parties to this Agreement. All communications and notices made or given pursuant to this Agreement, and all documentation and support to be provided, unless otherwise noted, shall be in the English language.
- h. **Modification.** This Agreement may only be amended or supplemented by a writing that refers explicitly to this Agreement and is signed by duly authorized representatives of CUSTOMER and UTILIWARE. No agent, employee or representative of UTILIWARE has the authority to bind the Parties to any representation or warranty unless such is specifically included in this Agreement, the SOF, or with a written Amendment thereto. Notice to Parties of disputes arising under this Agreement shall be sent by registered mail to the Parties to the address shown on the most recent service order.



- i. **Excused Performance.** Neither Party shall be liable to the other Party under this Agreement for any failure or delay in performance that is due to causes beyond its reasonable control, including but not limited to, acts of nature, governmental actions, fires, civil disturbances, interruptions of power, transportation problems, or telecommunication fiber cut.
- j. **Assignment.** CUSTOMER may not delegate, assign or transfer this Agreement, or any of CUSTOMER'S rights or duties hereunder, including by way of merger (regardless of whether CUSTOMER is the surviving entity) or acquisition, and any attempt to do so, without UTILIWARE'S express prior written consent, shall be void. UTILIWARE may assign this Agreement, and its rights and obligations hereunder, in its sole discretion.
- k. **Use Of CUSTOMER'S Name.** Neither CUSTOMER nor UTILIWARE shall use the other parties name in publicity or press releases without prior written consent. CUSTOMER will allow UTILIWARE to list CUSTOMER'S name and link CUSTOMER'S application/website from (<http://www.utiliware.com>) website.
- l. **Survival Provision.** The Parties' rights and obligations, which by their nature would extend beyond the termination, cancellation or expiration of this Agreement, shall survive such termination, cancellation or expiration.
- m. **Notices.** All formal notifications and transmittals to UTILIWARE issued pursuant to the provisions of this Agreement shall be sent to:

Utiliware Corporation  
 3830 Valley Centre Drive  
 Suite 705-295  
 San Diego, CA. 92130

All formal notices and transmittals to CUSTOMER shall be sent to:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Either Party may change the notice address or addressee by providing prior written notice.

- n. **Written Notice.** Where required, written notices are agreed to be delivered by overnight carrier (UPS Red or equivalent) with signature required, or by fax to the designated party. Notice is deemed given next business day in the case of overnight letter carrier, or on confirmation of receipt in the case of delivery by fax. Fax transmission receipt must be confirmed by telephone.



- o. **Default.** If CUSTOMER fails to pay for services rendered hereunder, UTILIWARE may, at its sole option and with written notice, issue a default termination letter to CUSTOMER to cure the default condition. If the default condition is not remedied within the time period specified in the notice letter, which shall not be less than fourteen (14) calendar days, UTILIWARE may then, without the necessity of any further notice, discontinue performance and terminate this Agreement, as applicable, for default and pursue any other remedies available at law or in equity. UTILIWARE’S failure to exercise any of its rights hereunder shall not constitute or be construed by CUSTOMER as being a waiver of any past, present, or future right or remedy.
  
- p. **Entire Agreement.** This Agreement, including SOF and all additional Attachments, constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements of such Parties in connection herewith. CUSTOMER acknowledges that it has not been induced to enter into this Agreement by any representative or promise not specifically expressed in this Agreement. Any modification made hereto shall not be valid and binding unless it is in writing and signed by both Parties.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

CUSTOMER	UTILIWARE
Authorized Representative Signature	Authorized Representative Signature William Dale
Authorized Name (Print or Type)	Authorized Name (Print or Type) President and CEO
Authorized Title	Authorized Title