



For EMC Use Only

Contract ID \_\_\_\_\_

**TEXAS ORDERING AGREEMENT**

This Texas Ordering Agreement (the “Texas Agreement” or “TOA”) is made effective as of \_\_\_\_\_ (the “Effective Date”) between:

**EMC Corporation**  
 (“EMC”)  
 176 South Street  
 Hopkinton, Massachusetts 01748  
 Email for Legal Notices: legalnotices@emc.com

And \_\_\_\_\_  
 \_\_\_\_\_  
 (“Customer”)  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Email for Legal Notices:  
 \_\_\_\_\_

This Texas Ordering Agreement governs Customer's procurement and use of all Products and Services ordered by Customer directly from EMC on or after the Effective Date. DIR Contract for Products and Services No. DIR-TSO-2634 (“the Contract”) and this Texas Ordering Agreement set forth the general terms and conditions under which EMC and Customer may periodically engage EMC to provide software and services to Customer. In the event of a conflict of terms, DIR Contract for Products and Services No. DIR-TSO-2634 and Appendix A – Standard Terms and Conditions for Product and Related Services Contracts will control.

**1. DEFINITIONS.**

- A. “Affiliate”** means a legal entity that is controlled by, controls, or is under common control with EMC or Customer, respectively. “Control” means more than 50% of the voting power or ownership interests.
- B. “Customer Support Tools”** means any software or other tools made available by EMC to Customer to enable Customer to perform various self-maintenance activities.
- C. “Documentation”** means the then-current, generally available, written user manuals and online help and guides provided by EMC for Products.
- D. “Installation Site”** means the ship-to address or other location identified on the EMC quote or other document prepared by EMC as the site of installation and/or use of a Product, or a subsequent location approved by EMC.
- E. “Maintenance Aids”** mean any hardware, software or other tools, other than Customer Support Tools, used by EMC to perform diagnostic or remedial activities on Products.
- F. “Products”** mean “Equipment” (which is the hardware delivered by EMC to Customer) and/or “Software” (which is any programming code provided by EMC to Customer as a standard product, also including microcode, firmware and operating system software).
- G. “Product Notice”** means the notice by which EMC informs Customer of product-specific use rights and restrictions, warranty periods, warranty upgrades and maintenance (support) terms. Product Notices will be delivered in an EMC quote, or in writing to Customer and may be posted on the applicable EMC website, currently located at [http://www.emc.com/products/warranty\\_maintenance/index.jsp](http://www.emc.com/products/warranty_maintenance/index.jsp). The terms of the Product Notice in effect as of the date of the EMC quote shall be deemed to be incorporated into and made a part of the relevant Customer purchase order when delivered and agreed to by Customer. Each Product Notice is dated and is archived when it is superseded by a newer version. EMC shall not change any Product Notice retroactively with regard to any Products listed on an EMC quote issued prior to the date of the applicable Product Notice. Upon request, EMC shall without undue delay provide a copy of the applicable Product Notice and/or attach it to the relevant EMC quote.
- H. “Services”** mean (i) services for the support and maintenance of Products (“Support Services”) as set forth in Attachment 1 to this TOA; or (ii) installation, implementation, or other services that are not Support Services (“Professional Services”) as set forth in Attachment 2 to this TOA.
- I. “Software Release”** means any subsequent version of Software provided by EMC after initial Delivery of Software, but does not mean a new Product.
- J. “Statement of Work” or “SOW”** means a document agreed to by Customer and EMC containing specifications and other transaction-specific details of the Professional Services to be provided by EMC. SOWs may, among other things, consist of (i) a separately executed, long form services specification; or (ii) a short form service description (called a “Service Brief”) with an accompanying EMC model number identified on a quote.
- K. “Supplier(s)”** means an entity (other than Customer) whose components, subassemblies, software and/or services have been incorporated into Products and/or Services.

## 2. QUOTING, PURCHASING AND PAYMENT.

**A. Quoting and Purchasing.** The description of the Products, Support Services, and Services identified in a Service Brief, and related pricing are as stated in a quote to Customer from EMC. Each quote is valid for the time period specified thereon. Customer may order the items on such quote by (i) issuing a purchase order to EMC that references such quote; or (ii) with the prior approval of EMC (a) signing such quote and returning it to EMC; or (b) sending an email or other writing to EMC referencing and ordering the items on such quote. Customer's order is accepted by EMC (1) issuing an e-mail or other written communication to Customer accepting such order; or (2) shipping the applicable Products to or commencing performance of the applicable Services. Each SOW (excluding the Service Brief) becomes binding on both parties when it is signed by EMC and Customer countersigns and returns the SOW to EMC (along with a purchase order if so required in the SOW).

**B. Payment.** Payments will be made in accordance with Appendix A, Section 8, to DIR Contract No. DIR-TSO-2634.

## 3. DELIVERY AND INSTALLATION.

**A. Product Delivery.** Title and risk of loss for sold Equipment and physical media containing Software shall transfer to Customer upon Customer's receipt and acceptance of said Equipment or physical media containing Software. Unless otherwise agreed, a common carrier shall be specified by EMC. Software may be provided by (i) Delivery of physical media; or (ii) electronic download (when so offered by EMC).

**B. Product Installation and Acceptance.** EMC's obligation, if any, to install a Product as part of the Product's purchase price or licensing fee, is set forth in the Product Notice. Acceptance that a Product operates in substantial conformity to the Product's Documentation occurs three (3) business days after Delivery or notice of availability for electronic download, as applicable. For orders issued after December 10<sup>th</sup> of each year, acceptance shall occur upon EMC's delivery to a carrier at EMC's designated point of shipment. Notwithstanding such acceptance in either circumstance, Customer retains all rights and remedies set forth below in Section 5 entitled "Warranty."

**4. EMC SELECT PRODUCTS (5 Products listed in EMC Proposal).** Periodically, EMC may offer to supply or license certain products or services that are made or provided by a third party supplier or manufacturer and not EMC. Some of such products or services are specifically identified as "EMC Select Products" and are listed at: <http://www.emc.com/partnersalliances/programs/select.jsp>. Notwithstanding any other provisions of this Texas Ordering Agreement, EMC Select Products are subject to the standard license, warranty, indemnity, support and other terms of the third party supplier or manufacturer (or an applicable agreement between Customer and such supplier or manufacturer), to which Customer shall adhere. Even if support fees are invoiced through EMC, EMC Select Products are not supported by EMC and Customer must contact such third party directly for support services. Any warranty or indemnity claims against EMC in relation to EMC Select Products are expressly excluded. In no event shall EMC be liable to Customer for any damages that in any way arise out of or relate to any EMC Select Products. EMC Select Products are provided by EMC "AS IS."

## 5. WARRANTY.

**A. Equipment.** EMC warrants that Equipment, and Equipment upgrades installed into Equipment, when purchased from EMC and operated with normal usage and regular recommended service, shall be free from material defects in materials and workmanship, and perform substantially in accordance with Documentation provided for Equipment until the expiration of the warranty period. Unless otherwise noted on the Product Notice or EMC quote, the warranty coverage for the microcode, firmware or operating system software that enables Equipment to perform as described in its Documentation shall be no less than that which applies to such Equipment. To the extent specified in the Product Notice, Support Services in the form of the Support Option noted on the Product Notice are included free of charge during the Equipment warranty period. In some cases, a Support Option upgrade during the Equipment warranty period may be available separate purchase.

**B. Software.** EMC warrants that Software will substantially conform to the applicable Documentation for such Software and that any physical media provided by EMC will be free from manufacturing defects in materials and workmanship until the expiration of the warranty period. EMC does not warrant that the operation of Software shall be uninterrupted or error free, that all defects can be corrected, or that Software meets Customer's requirements, except if expressly warranted by EMC in its quote. Support Services for Software are available for separate purchase and the Support Options are identified in the Product Notice.

**C. Duration.** Unless otherwise stated on the EMC quote, the warranty period from EMC for Products shall be as set forth in the Product Notice. Equipment warranty commences upon Delivery. Software warranty commences upon Delivery of the media or the date Customer is notified of electronic availability, as applicable. Equipment upgrades are warranted from Delivery until the end of the warranty period for the Equipment into which such upgrades are installed.

**D. Customer Remedies.** EMC's entire liability and Customer's exclusive remedies under the warranties described in this Section shall be for EMC, at its option, to remedy the non-compliance or to replace the affected Product, and if EMC is unable to effect such within a reasonable time, then EMC shall refund the entire amount paid by Customer if non-compliance is brought to EMC's attention within thirty (30) calendar days of acceptance of the Product, and thereafter as depreciated on a straight line basis over a five (5) year period, upon return of such Product to EMC. All replaced Products or portions thereof shall be returned to and become the property of EMC. If

such replacement is not so returned, Customer shall pay EMC's then current spare parts price therefore. EMC shall have no liability hereunder after expiration of the applicable warranty period.

**E. Exclusions.** Warranty does not cover problems that arise from (i) accident or neglect by Customer or any third party; (ii) any third party items or services with which the Product is used or other causes beyond EMC's control; (iii) installation, operation or use not in accordance with EMC's instructions or the applicable Documentation; (iv) use in an environment, in a manner or for a purpose for which the Product was not designed; (v) modification, alteration or repair by anyone other than a manufacturer authorized repair person, EMC or its authorized representatives; or (vi) in case of Equipment only, causes not attributable to normal wear and tear. EMC has no obligation whatsoever for Software installed or used beyond the licensed use, for Equipment which was moved from the Installation Site without EMC's consent or whose original identification marks have been altered or removed.

**F. No Further Warranties.** EXCEPT AS EXPRESSLY STATED HEREIN, AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, WITH REGARD TO PRODUCTS, SERVICES OR ANY OTHER ITEMS OR MATTERS ARISING HEREUNDER, EMC (INCLUDING ITS SUPPLIERS) MAKES NO OTHER EXPRESS WARRANTIES, WRITTEN OR ORAL, AND DISCLAIMS ALL IMPLIED WARRANTIES. INsofar AS PERMITTED UNDER APPLICABLE LAW, ALL OTHER WARRANTIES ARE SPECIFICALLY EXCLUDED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE.

**EMC Corporation ("EMC")**

By (Sign): \_\_\_\_\_  
Name (Print): \_\_\_\_\_  
Title: \_\_\_\_\_

**Customer**

By (Sign): \_\_\_\_\_  
Name (Print): \_\_\_\_\_  
Title: \_\_\_\_\_