

TERMS AND CONDITIONS

THESE TERMS AND CONDITIONS (the “Terms and Conditions”) are made and entered in to as of today’s date, by and between (a) on the one hand, the person, entity or organization accepting a DRES-issued Invoice into which these Terms and Conditions have been incorporated by reference (together with these Terms and Conditions, the “Agreement”) (“Company”); and (b) on the other hand, Digital River Education Services, Inc., with offices located at 9625 W. 76th Street, Eden Prairie, MN 55344(“DRES”) (DRES and Company each, a “Party”, and together, the “Parties”).

PLEASE READ THIS ENTIRE AGREEMENT CAREFULLY, AS IT FORMS PART OF A LEGALLY BINDING AGREEMENT BETWEEN YOU AND DRES. Please print a copy of this Agreement for your records by selecting File > Print within your Web browser.

BY ACCEPTING AN INVOICE INTO WHICH THIS TERMS AND CONDITIONS IS INCORPORATED BY REFERENCE, YOU REPRESENT AND WARRANT THAT YOU HAVE THE AUTHORITY TO BIND COMPANY TO THE PROMISES MADE TO DRES IN THE INVOICE AND THESE TERMS AND CONDITIONS. DRES WILL RELY ON YOUR REPRESENTATION, AND PROVIDE THE PRODUCTS AND/OR SERVICES REQUESTED TO COMPANY, ON THE FOLLOWING TERMS.

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Scope & Application
2. The terms and conditions set forth in these Terms and Conditions shall automatically be incorporated by reference into any DRES-issued Invoice accepted by Company, and all references herein to the Agreement shall be construed as references to the Invoice together with these Terms and Conditions. For the avoidance of doubt, the following shall constitute, without limitation, clear and convincing evidence of Company’s acceptance of the DRES-issued Invoice: (a) payment of the invoice by Company to DRES, (b) Company’s failure to notify DRES that it does not accept the Agreement prior to DRES’ commencement of performance, or (c) Company fails to notify DRES that it does not accept the Agreement within five (5) business days from receipt of the DRES-issued Invoice.
3. Offer, Acknowledgement and Acceptance
 - 3.1 Any prices, quotations and descriptions made or referred to in any catalog, website, verbal quote, written quote or communicated to Company in any other manner are subject to availability, do not constitute an offer and may be withdrawn or revised at any time prior to DRES’ express acceptance of Company’s order as evidenced by DRES’ fulfillment of Company’s order.
 - 3.2 While DRES will make every effort to ensure that Products are available, DRES cannot guarantee that all Products are in stock or immediately available. DRES may reject Company’s order (without liability) if DRES is unable to process or fulfill it. If this is the case, DRES will refund any prior payment that Company has made for that item.
 - 3.3 An order submitted by Company constitutes an offer by Company to DRES to purchase Products or Services on the terms and conditions set forth in this Agreement and is subject to DRES’ subsequent acceptance.
 - 3.4 DRES’ acceptance of Company’s order takes effect upon the date of DRES’ receipt of Company’s payment pursuant to the DRES-issued Invoice (“Acceptance”) and the contract concluded at the point where DRES has dispatched Company’s Order.

4. Price and Terms of Payment

- 4.1 Prices payable for Products or Services are those in effect at the time of dispatch or delivery, unless otherwise expressly agreed in the Invoice.
- 4.2 DRES shall have the right at any time prior to its Acceptance to withdraw any discount and/or to revise prices to take into account increases in costs including (without limitation) costs of any materials, carriage, labor or the increase or imposition of any tax, duty or other levy and any variation in exchange rates. DRES also reserves the right to notify Company of any mistakes in Product descriptions or errors in pricing prior to product dispatch. Company acknowledges that the Product or Service will be provided in accordance with such revised description or corrected price.
- 4.3 DRES has the right at any time prior to its Acceptance to revise prices to take into account increases in costs of any materials, carriage, or the increase or imposition of any tax, duty or other levy and any variation in exchange rates. DRES also reserves the right to notify Company of any mistakes in Product descriptions or errors in pricing prior to product dispatch. In such event if Company chooses to continue with fulfillment of the order, Company acknowledges that the Product or Service will be provided in accordance with such revised description or corrected price.
- 4.4 Unless otherwise specified, prices quoted are:
- 4.4.1 exclusive of the costs of shipping or carriage to the agreed place of delivery within the Territory(as defined below) (charges for which are stated on the Purchase Order); and
- 4.4.2 exclusive of VAT and any other tax or duty, which (where applicable) may be added to the price payable;
- 4.5 Company agrees to pay for taxes, shipping or carriage of Products.
- 4.6 Except as expressly provided elsewhere in this Agreement, payment may be taken in full notwithstanding any claim for short delivery or defects.
- 4.7 No counterclaim or set-off may be deducted from any payment due without our written consent. DRES may also take action against Company for the price of Products at any time after payment has become due.
- 4.8 Any extension of credit allowed to Company may be changed or withdrawn at any time. Interest shall be chargeable on overdue amounts accruing on a daily basis at the maximum amount permitted under applicable law from the due date for payment until our receipt of the full amount (whether before or after judgment). Company shall indemnify DRES on demand against any out of pocket expenses incurred in relation to recovery of any overdue amounts.
- 4.9 Company and its employees and agents agree that all pricing and terms of any Purchase Order and this Agreement (the "Confidential Information") are to be kept strictly confidential. Notwithstanding the forgoing, Company may communicate the terms of an Purchase Order or this Agreement to its qualifying employees as is reasonably necessary to distribute the Products. Company acknowledges and agrees that DRES may provide certain information about Company and its Purchase Order to Product vendors, developers, licensors, publishers manufacturers, distributors and/or suppliers as it relates to DRES' performance of obligations pursuant to this Agreement. Notwithstanding anything to the contrary, a party may disclose the Confidential Information of the other party to the extent required by a court of competent jurisdiction or other governmental authority, or otherwise as required by law, provided that such party required to make the disclosure provides the other party with prior notice of such obligation in order to

permit that other party a reasonable opportunity to take legal action to prevent or limit the scope of such disclosure and coordinates with the other party in an effort to limit the nature and scope of such disclosure.

5. Term and Termination

5.1 Termination. If Company commits an act of bankruptcy or enters into a deed of arrangement with creditors or a court order for winding-up is made against Company or Company takes or suffers any similar action in consequence of debt or DRES has cause to believe that Company are unable to pay Company's debts as they fall due; or Company fails to pay any amount by the due date or breach any of the provisions in this Agreement then, without prejudice to any of DRES' other rights, DRES may:-

5.1.1 stop any Products in transit; and/or

5.1.2 suspend further Product deliveries; and/or

5.1.3 stop or suspend provision of Services; and/or

5.1.4 by written notice, terminate Company's order and all or any other contracts between Company and DRES.

5.2 Survival. The provisions of this Agreement which, by their terms, require performance after the termination of this Agreement, or have application to events that may occur after such termination, shall survive the termination of this Agreement.

6. Delivery and Risk

6.1 Delivery timescales/dates specified in an order acknowledgement, acceptance, invoice, or elsewhere are estimates only. While DRES endeavors to meet such timescales or dates, DRES does not undertake to dispatch Products and/or commence Services by a particular date or dates and shall not be liable to Company in respect of delays or failure to do so.

6.2 If Company refuses or fails to take delivery of Products provided in accordance with this Agreement, any risk of loss or damage to the Products shall nonetheless pass and without prejudice to any other rights or remedies DRES has:

6.2.1 DRES shall be entitled to immediate payment in full for the Products or Services delivered and either to effect delivery by whatever means DRES considers appropriate or to store Products at Company's risk;

6.2.2 Company shall be liable pay on demand all costs of Product storage and any additional costs incurred as a result of such refusal or failure to take delivery;

6.2.3 DRES shall be entitled sixty (60) days after the agreed date for delivery to dispose of Products in such manner as DRES determines and may set off any proceeds of sale against any sums due from Company.

6.3 Except to the extent required as a result of any mandatory rights Company may have under applicable law, Company shall not be entitled to reject the Products in whole or in part by reason of short delivery and shall pay in full notwithstanding short delivery or non-delivery unless Company notifies DRES in writing of any claim within seven (7) days of the latest of the date of receipt of the relevant invoice or delivery whereupon Company shall pay for the quantity actually delivered.

6.4 Where DRES delivers Products by installments, each installment constitutes a separate contract and any defect in any one or more installments shall not entitle Company to repudiate the contract as a whole nor to cancel any subsequent installment.

6.5 Save as otherwise provided in these Conditions, risk of loss of or damage to the Products passes to Company upon the time at which (i) for License Keys for the Product(s), the delivery of the License Keys to Company; (2) for other physical Products, when Products placed in Company's possession or that of any carrier or transport provided by Company, whichever shall occur first.

7. Rejection, Damage or Loss in Transit

7.1 Except as set out above and subject to any rights Company may have under applicable law that cannot be excluded or limited by this Agreement:

7.1.1 DRES shall not be liable and Company shall not be entitled to reject Products or Services, except for:

- (a) damage to or loss of physical Products or any part thereof in transit (where the Products are carried by DRES' own transport or by a carrier on our behalf) where notified to DRES within 5 working days of receipt of the Products;
- (b) defects in Products (not being defects caused by any act, neglect or default on your part) notified in writing to DRES within 30 days of receipt of the Products.
- (c) defective performance of Services (not being defects caused by any act, neglect or default on your part) where notified in writing to DRES within 5 days of such defect becoming apparent.

7.1.2 DRES shall not be liable for any damage or losses arising from defective installation of the Products; from the use of the Products in connection with other defective, unsuitable or defectively installed equipment; Company's or its representative's negligence; improper use or use in any manner inconsistent with the manufacturer's specifications or instructions.

7.1.3 where there is a shortage or failure to deliver, or any defect in or damage to a Product or Service, DRES may at our option:

- (a) (in the case of Product shortage or non-delivery) make good any such shortage or non-delivery and/or
- (b) in the case of failure to perform or defective performance of a Service, make good such failure or defective performance; and/or
- (c) in the case of damage or any defect(s) in the Product and in accordance with any applicable Returns Policy:
 - (i) Replace or repair the Product upon Company returning the Product; or
 - (ii) Refund the price paid in respect of any Products found to be damaged or defective.

8. Software

8.1 Where any Product supplied is or includes software (“Software”), this Software is licensed by DRES or by the relevant licensor/owner subject to the relevant end-user license agreement or other license terms included with Software (“License Terms”) and/or the Product. In addition:

8.1.1 Such Software may not be copied, adapted, translated, made available, distributed, varied, modified, disassembled, decompiled, reverse engineered or combined with any other software, save to the extent that (i) this is permitted in the License Terms, or (ii) applicable law expressly mandates such a right which cannot legally be excluded by contract.

8.1.2 Save to the extent provided for in any applicable License Terms, Company’s rights of return and/or to a refund (if allowed under this Agreement and any applicable Returns Policy) do not apply in the event that Company opens the Software shrink-wrap and/or break the license seal and/or use the Software.

8.1.3 Except to the extent expressly provided by DRES in writing or under relevant License Terms, Software is provided ‘as is’ without any warranties, terms or conditions as to quality, fitness for purpose, performance or correspondence with description and we do not offer any warranties or guarantees in relation to Software installation, configuration or error/defect correction. Company is advised to refer to any License Terms with regards to determining Company’s rights against a manufacturer, licensor or supplier of the Software.

9. Company’s Representations and Warranties.

9.1 Company represents and warrants to DRES that: (i) it has full right, power and authority to enter into and fully perform its obligations under this Agreement, including without limitation the right to bind any party it purports to bind to this Agreement; (ii) the execution, delivery and performance of this Agreement by that Party does not conflict with any other agreement to which it is a party or by which it is bound; (iii) it shall comply with all material laws, rules and regulations (including without limitation Export Control Laws) applicable to its activities in connection with this Agreement; (iv) any information provided by Company on any Purchase Order is up-to-date materially accurate and is sufficient for DRES to fulfill Company’s Order; (v) it shall not assume any warranty, commitment or any other obligation on DRES’ behalf or on behalf of a Product manufacturer, developer, vendor, publisher, licensor, distributor or supplier without DRES’ express prior written consent; (vi) that it shall not purchase products for use or distribution outside of the Territory; and (vii) it will not resell or further distribute the goods or services purchased under this Agreement.

10. Warranties and Disclaimers.

10.1 **WARRANTY “AS IS” IN GENERAL – WITHOUT REGARD TO SEPARATE WARRANTY STATEMENTS PACKAGED BY THE MANUFACTURER WITH THE PRODUCTS;**

10.2 All Product specifications, illustrations, drawings, particulars, dimensions, performance data and other information provided to Company by DRES via website, catalog, written or verbal quote, or otherwise made available by DRES are intended to represent no more than a general illustration of the Products and do not constitute a warranty or representation by DRES that the Products will conform with the same. Company must refer to the manufacturer’s specifications or warranty documentation to determine Company’s rights and remedies in this regard.

- 10.3 Company will have the benefit of the manufacturer's, licensor's or supplier's warranty with the Products supplied and should refer to the relevant documentation supplied with the Product in this regard. (If applicable, a Returns Policy may also set out procedures applicable to repairs or replacement of defective Products delivered.)
- 10.4 Company's rights of repair or replacement of any Products or any part or parts thereof which are found to be defective will (except where agreed otherwise) be negated or rendered void where:
- 10.4.1 Products have been repaired or altered by persons other than the manufacturer, DRES or any authorized dealer; and/or
- 10.4.2 defective Product or Products have not been returned together with full details in writing of the alleged defects within 30 days from the date on which such Products were delivered; and/or
- 10.4.3 defects are due (wholly or partially) to mistreatment, improper use or storage or maintenance or installation, or failure to observe any manufacturers' instructions or other directions issued or made available by us in connection with the delivered Products.
- 10.5 EXCEPT AS EXPRESSLY STATED OTHERWISE IN THIS SECTION, DRES MAKES NO EXPRESS WARRANTIES OR REPRESENTATIONS AND DISCLAIMS ALL IMPLIED WARRANTIES AND REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. THIS AGREEMENT STATES YOUR SOLE AND EXCLUSIVE REMEDIES.
11. Risk Allocation. THE TERMS WITHIN THIS SECTION 11 REFLECT AN AGREED UPON ALLOCATION OF RISK BETWEEN THE PARTIES SUPPORTED BY (AMONG OTHER THINGS) THE PRICING AGREED TO BETWEEN THE PARTIES, AND IS A FUNDAMENTAL PART OF THE BASIS OF THE BARGAIN BETWEEN THEM.
- 11.1 Indemnification.
- 11.1.1 Company and its successors and assigns shall indemnify, defend, and hold harmless DRES, its Corporate Affiliates, and their successors and assigns from and against any and all: demands, judgments, losses, costs, expenses, obligations, liabilities, damages, fines, recoveries and deficiencies, including without limitation interest, penalties, reasonable attorneys' fees and costs (collectively, "Losses") in connection with a claim, action, suit or proceeding made, brought or commenced by a third party other than a Corporate Affiliate of DRES (each, a "Claim"), that DRES may incur or suffer, which arise, result from, or relate to: (i) Company's breach of any of its representations, warranties or covenants set forth in this Agreement, or (ii) Company's failure to perform any of its material obligations under this Agreement, or (iii) the direct or indirect result of DRES performing Services or carrying out any work on or to the Products where this has been done to your (or your representative's) specific requirements or specifications causing an infringement or alleged infringement of any proprietary rights of any third party.
- 11.1.2 To the fullest extent permitted by law and save where expressly set out in any License Terms or elsewhere, DRES shall have no liability to Company in the event of the Products or Services infringing or being alleged to infringe the proprietary rights of any third party. In the event that the Products are or may be the subject of patent, copyright, database right, registered design, trade mark or other rights of any third party, Company should refer to the relevant terms of the Product manufacturer and/or licensor/owner. DRES shall be obliged to transfer to Company only such right or title as it has.

11.1.3 Limitation of Liability and Damages. **TO THE MAXIMUM EXTENT LEGALLY PERMITTED, WHETHER OR NOT DRES WAS AWARE OR ADVISED OF THE POSSIBILITY OF DAMAGES, AND WHETHER OR NOT THE LIMITED REMEDIES PROVIDED HEREIN FAIL OF THEIR ESSENTIAL PURPOSE (1) DRES AGGREGATE LIABILITY (WHETHER FOR BREACH OF CONTRACT, TORT OR ANY OTHER LEGAL THEORY) SHALL IN NO CIRCUMSTANCES EXCEED THE COST OF THE PRODUCT COMPANY ORDERED THAT IS MOST CLOSELY RELATED TO YOUR DAMAGES AND (2) DRES SHALL NOT BE LIABLE FOR SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, LOST PROFITS, LOST REVENUE, OR COST OF COVER.**

12. Territory, Consents, Customs Duties & Export

12.1 The territory applicable to this Agreement and any order shall be: (1) for each Geographic-Restricted Product, the restricted sales territory associated with that Geographic-Restricted Product; and (2) for all other Products, all countries in the world except (i) countries to which export or re-export of any Product (a) is prohibited by applicable law or DRES corporate policy or (b) would require DRES to obtain an export license, with no license exception available; and (ii) countries that may be hereafter explicitly excluded pursuant to the subsequent mutual written agreement of the Parties (“Territory”).

12.2 By accepting this agreement Company confirms that it is not located in (or a national resident of) any country under U.S. Economic embargo or sanction, not identified on any [U.S. Department of Commerce Denied Persons List](#), [Entity List of proliferation concern](#), on the US State Department [Debarred Parties List](#) or [Treasury Department Designated Nationals](#) exclusion list, and not directly or indirectly involved in the financing, commission or support of terrorist activities or in the development or production of nuclear, chemical, biological weapons or in missile technology programs as specified in the [U.S. Export Administration Regulations \(15 CRF 744\)](#) and hardware, software, technology, or services may not be exported, re-exported, transferred or downloaded to any such entity.

12.3 If any license or consent of any government or other authority is required for the acquisition, carriage or use of the Products by Company, Company shall obtain such license or consent at Company’s own expense and if necessary produce evidence to DRES on demand. Failure so to do shall not entitle Company to withhold or delay payment of the price. Any additional expenses or charges incurred by DRES resulting from such failure shall be met by Company.

12.4 Products licensed or sold to Company under this Agreement may be subject to export control laws and regulations in the Territory or other relevant jurisdiction where Company takes delivery or uses them. Company shall be responsible for complying with those laws and will not do anything to breach them.

12.5 Items entering the European Economic Area from outside over a certain value may be subject to customs charges (e.g. where costs are in excess of Company’s personal import allowance). Company may be subject to customs charges, import duties and taxes, levied when the Product reaches Company’s specified destination. Any such additional charges for customs clearance or import duties or taxes must be met by Company, since DRES has no control over what these charges are. Company should contact the local customs office in the relevant jurisdiction for further information on customs policies or duties.

13. Miscellaneous

13.1 Inurement; Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties and their permitted successors and assigns. Neither Party may assign this Agreement, or assign its rights or delegate its duties hereunder (whether directly or indirectly, in whole or in part, by operation of law or otherwise) without the prior written consent of the other Party, which consent shall not be unreasonably

withheld or delayed. Notwithstanding the foregoing, in the event of a merger, acquisition, joint venture, change of control, or sale of substantially all of its assets or business of a Party (or any substantially similar transaction), and so long as the entity to which the contract is assigned is not a direct competitor of the other Party, that Party shall be entitled (upon written notice to, but without the prior written consent of, the other Party) to assign this agreement to the surviving entity in connection with such transaction. At the option of the other Party, the assigning Party shall guarantee in writing the performance of the assignee if the assigning Party remains in existence following such assignment.

- 13.2 Governing Law. This Agreement shall be governed by the laws of the State of Minnesota in the United States of America without reference to or use of any conflicts of laws provisions therein. For the purpose of resolving conflicts related to or arising out of this Agreement, the Parties expressly agree that venue shall be in the State of Minnesota in the United States of America only, and, in addition, the Parties hereby consent to the exclusive jurisdiction of the federal and state courts located in Hennepin County, Minnesota in the United States of America. The Parties specifically disclaim application (i) of the United Nations Convention on the International Sale of Goods, 1980, and (ii) of Article 2 of the Uniform Commercial Code as codified.
- 13.3 Irreparable Harm. Company acknowledges that its breach of this Agreement would cause irreparable injury to DRES for which monetary damages are not an adequate remedy. Accordingly, DRES shall be entitled to seek injunctive relief and other equitable remedies in the event of a breach of the terms of this Agreement, without the necessity of posting a bond in connection therewith. The availability of injunctive relief shall be a cumulative, and not an exclusive, remedy available to DRES.
- 13.4 Notices. Any notification of any event required pursuant to this Agreement shall be in writing, shall be in the English language, shall reference this Agreement, and shall be personally delivered or sent by nationally or internationally recognized express courier to the other Party at the address specified at the beginning of this Agreement, ATTN: General Counsel. Notices may be sent via confirmed fax with a copy sent via overnight courier (notices by confirmed fax to DRES shall be sent to 952-674-4444). Notice shall be deemed effective upon the delivery (as evidenced by the delivery receipt).
- 13.5 Other. This Agreement sets forth the entire understanding between the Parties with respect to the subject matter thereof, and supersedes any and all prior or contemporaneous proposals, communications, agreements, negotiations, and representations, whether written or oral, regarding the subject matter thereof. The terms and conditions set forth in this Agreement prevail over any other terms or conditions contained in or referred to elsewhere or implied by trade, custom or course of dealing. No provisions in Company's purchase orders, invoices or other business forms shall modify, supersede or otherwise alter the terms of this Agreement. Any purported terms or conditions to the contrary are hereby excluded to the fullest extent legally permitted. To the fullest extent permitted under applicable law, DRES reserves the right to modify this Agreement upon prior written notice to Company with effect for the future – subject to Company's right to reject, by way of written notice, our modifications to this Agreement with respect to any orders for which Acceptance, but not yet fulfillment, has occurred. There are no third party beneficiaries of this Agreement except to the extent expressly stated herein. DRES may engage the services of subcontractors or agents to assist DRES in the performance of its obligations and will be responsible for the acts and omissions of such subcontractors and agents. No waiver of any provision or breach of this Agreement (a) shall be effective unless made in writing, or (b) shall operate as or be construed to be a continuing waiver of such provision or breach. In the event any portion of this Agreement is held to be invalid or unenforceable, such portion shall be construed as nearly as possible to reflect the original intent of the Parties, or if such construction cannot be made, such provision or portion thereof shall be severable from this Agreement, provided that the same shall not affect in any respect whatsoever the remainder of this Agreement. Each Party is an independent contractor of, and is not an employee, agent or authorized representative of, the other Party. The provisions of this Agreement shall not, in any respect or manner whatsoever, be construed as to create a partnership, joint venture, or other business combination between the Parties, and no Party shall have the right, power or authority to act or create any obligation, express or implied, on behalf of each other. DRES shall not be in breach of this Agreement nor held liable for any loss or damage which may be suffered as a direct or indirect result of DRES being prevented, hindered or delayed in the performance by reason of any circumstances beyond its reasonable control including (but not limited to) any act of God, war, terror, riot, civil commotion, government action, explosion, fire, flood, storm, accident, strike, lock-out, trade dispute or labor disturbance, breakdown of plant or machinery,

interruption in the supply of power, Internet communications, or materials and in such event DRES may elect to cancel Company's order and refund any payments made. Notwithstanding any applicable statute of limitations, the Parties agree that any claims for breach of this Agreement shall be brought by a Party within two (2) years of the date that Party first learns of such breach.

COMPANY HEREBY AGREES (A) TO THE USE OF ELECTRONIC SIGNATURES, CONTRACTS, ORDERS AND OTHER RECORDS. Further, Company hereby waives any rights or requirements under any statutes, regulations, rules, ordinances or other laws in any jurisdiction which require an original signature or delivery or retention of non-electronic records, or to payments or the granting of credits by other than electronic means.