

Form 9.17

Hardware Purchase and Software License Agreement

HARDWARE PURCHASE AND SOFTWARE
LICENSE AGREEMENT

THIS HARDWARE PURCHASE AND SOFTWARE LICENSE AGREEMENT ("Agreement") is made this ^ day of ^, 19^, by and between ^ABC Inc., an Illinois corporation located at ^ ("Seller") and ^DEF Inc., an Illinois corporation located at ^ ("Buyer").

WHEREAS:

Seller is in the business of selling computer equipment and developing and selling software for computer equipment. Seller desires to sell and license, and Buyer desires to acquire, a computer system as more particularly described herein.

NOW THEREFORE:

§1. *DEFINITIONS.*

The following definitions shall apply whenever used in this Agreement:

§1.1 *System.*

The term "System" shall mean the computer system comprising the hardware, software and related equipment, and having all the qualities and features, and being capable of performing all of the functions, described in the Specifications.

§1.2 *Specifications.*

The term "Specifications" shall mean all of the detailed design specifications and agreements set forth in:

(a) Schedule A hereto, which consists of a list of new equipment (hereinafter sometimes referred to as the "Equipment"),

(b) Schedule B hereto, which consists of a description of software products and services (hereinafter sometimes referred to as the "Software"),

(c) Schedule C hereto, which sets forth a list and description of features of the System,

(d) Exhibit A hereto, which sets forth design and power specifications of the System,

(e) Exhibit B hereto, which is a copy of that certain Agreement of Seller and Buyer dated ^, 19^, and

(f) Exhibit C hereto, which is a copy of that certain letter agreement from ^, President of Buyer, to President of Seller, dated ^, 19^.

§1.3 Effective Level of Performance.

The term "Effective Level of Performance" shall mean the result determined by dividing (a) the remainder obtained by subtracting from Operation Use Time the System Failure Time, by (b) Operation Use Time, and expressing the quotient as a percentage.

§1.4 Operation Use Time.

The term "Operation Use Time" shall mean the time, measured in whole minutes, during which the System is scheduled for operation for the purposes intended by Buyer.

§1.5 System Failure Time.

The term "System Failure Time" shall mean the time, measured in whole minutes, during which the System's central processing unit, the Equipment's operating system or firmware, or the Software or any combination thereof, is inoperable, but does not include any such failure which is caused solely by Buyer or Buyer's employees. System Failure Time shall be deemed to include the time between successive periods of System Failure Time where the time between such successive periods is 30 minutes or less.

§1.6 Preliminary Test.

The term "Preliminary Test" shall mean the execution by Seller of diagnostic routines on the System sufficient to determine if the System is fit and ready for use by the Buyer in accordance with the Specifications, as more fully described in §6.(d) hereof.

§1.7 Preliminary Test Date.

The term "Preliminary Test Date" shall mean that date on which the Buyer receives Seller's written certification to the effect that the Preliminary Test has been completed satisfactorily and that the System is fit and ready for use by the Buyer in accordance with the Specifications.

§1.8 Conversion.

"Conversion" shall be the process of transferring the Buyer's applicable diskettes into the System more fully described in §6.5 hereof.

§1.9 System Acceptance Test.

The term "System Acceptance Test" shall mean the acceptance test applicable to the system which is more fully described in §6.5 hereof.

§1.10 System Acceptance Date.

The term "System Acceptance Date" shall mean the date on which the Buyer gives Seller written notice that the System successfully passes the System Acceptance Test.

§1.11 *System Documentation.*

The term "System Documentation" shall mean the set of documents and manuals and source code which collectively contain a complete description and definition of all System operations and all user guides describing the operation and management of the System.

§2. *PURCHASE AND SALE.*

Seller agrees to sell, and the Buyer agrees to purchase, the System upon the terms and subject to the conditions set forth in this Agreement.

§3. *PURCHASE PRICE.*

Buyer shall pay to Seller the following: a purchase price of \$^ as the total System purchase price (hereinafter referred to as the "Purchase Price"), which Purchase Price includes payment for the cost of the Equipment, installation, delivery, handling and insurance of the Equipment, a one-time, fully paid license fee for the Software, the training of the Buyer's personnel by Seller, and all applicable sales and use taxes.

§4. *PAYMENT.*

Buyer shall pay to Seller \$^ toward the Purchase Price upon the execution of this Agreement by both parties hereto. Buyer shall pay an additional \$^ toward the Purchase Price on the Preliminary Test Date. The balance of the Purchase Price, \$^, shall be paid by Buyer to Seller within 30 days of the System Acceptance Date.

§5. *CANCELLATION.*

Buyer may cancel this Agreement without cause by giving Seller written notice thereof. In the event Buyer cancels this Agreement without cause, Buyer shall pay a cancellation charge to Seller in an amount equal to the cancellation charge incurred by Seller from the manufacturer(s) for cancellation of purchase of the Equipment. Deposits tendered herewith shall be applied to the cancellation charges. Any balance due shall be charged to Buyer.

§6. *DELIVERY, INSURANCE AND INSTALLATION OF EQUIPMENT.*

(a) Seller shall deliver all of the Equipment at Buyer's offices at ^, ^, Illinois on or before ^, 19^. Seller shall give Buyer notice of the impending delivery of the Equipment at least five days prior to such delivery unless the Buyer consents to a shorter notice period.

(b) Buyer shall not bear the risk of loss or damage to the Equipment until it is delivered to the loading dock at Buyer's designated address of delivery. Thereafter Buyer shall bear the entire risk of loss or damage to the Equipment, provided that damage caused by any manufacturer or Seller shall be borne by Seller.

(c) All costs of transportation, delivery and installation shall be paid by Seller. All costs of assembly of the System shall be paid by Buyer.

(d) Buyer, under the direction of Seller, shall complete the installation and assembly of

the System on or before ^, 19^. The installation and assembly of the System will be deemed complete upon the System passing the Preliminary Test. The details of the diagnostic routines which are part of the Preliminary Test will be developed by Seller with consultation and reasonable concurrence of Buyer. All costs associated with the Preliminary Test shall be borne and paid by Seller.

(e) On or before ^, 19^, Buyer, at its expense, but at the direction of Seller, shall have converted all applicable diskettes into a form which can be accurately used by the System. It is understood that the System shall be operable according to the Specifications upon the completion of the Conversion.

(f) The System shall be subject to the System Acceptance Test which shall commence on the first business day following the Conversion. The Systems Acceptance Test shall consist of (i) the System's performing in accordance with the Specifications to Buyer's satisfaction over a period of not less than 30 days and (ii) the maintenance by the System of an aggregate Effective Level of Performance of not less than 99% over a period of 30 consecutive days. In the event the System shall not pass the System Acceptance Test during the first 30 consecutive days after the Conversion, Seller shall promptly use its best efforts to determine and correct the causes of the System's failure to pass such test and the System Acceptance Test shall be continued on a day-today basis until such test shall be passed, subject to the provisions of §14(a) hereof.

(g) Before the Preliminary Test, Seller will deliver to Buyer one copy of the System Documentation, which Seller hereby represents and warrants is the only documentation necessary for the effective operation of the System.

§7. TRAINING.

By ^, 19^, Seller, at its expense, shall have provided Buyer at Buyer's offices with sufficient training to permit Buyer to fully operate the System according to the Specifications.

§8. EQUIPMENT MAINTENANCE.

Other than as specifically provided elsewhere in this Agreement, this Agreement shall not be interpreted to require any maintenance by Seller of the Equipment being sold hereunder. Any maintenance obligations not created hereunder shall be governed by separate agreement.

§9. OPERATING SYSTEM AND FIRMWARE.

As updates or revisions are made to either the operating systems or firmware incorporated in the Equipment, such updates and revisions shall be offered to Buyer in accordance with manufacturer price schedules then in force and effect. Seller shall cause the manufacturer of the Equipment to provide Buyer at no additional cost with a fully paid perpetual license to use the operating system and firmware incorporated in the Equipment and a letter from such manufacturer to the effect that such manufacturer shall grant a similar license at no additional cost to any subsequent purchaser of the Equipment.

§10. SOFTWARE LICENSE.

(a) Seller grants to Buyer a perpetual, nonexclusive license to use the Software. For purposes of this Agreement, the licensed Software shall include all related materials, source code, documentation, enhancements and information provided by Seller to Buyer under this Agreement.

(b) Seller shall provide Buyer with all notifications, updates or corrections of existing problems related to the Software modules installed on Buyer's Equipment. Such notification or Software shall be forwarded to Buyer within 15 days from receipt by Seller. All support services required (including tape copies and analyst time) shall be billed by Seller at the standard rate then in effect or per a software support agreement, if in effect.

(c) Buyer acknowledges that the Software is the property of Seller and that the Software is being made available to Buyer in confidence and solely on the basis of its confidential relationship to Seller. Buyer agrees to use reasonable efforts to prevent Buyer's employees from printing, copying, providing or otherwise making available, in whole or in part, any portion of any original or modified Software or related materials except for installation and use by Buyer and except as may be needed for backup security.

§11. *PROGRAMMING AND SUPPORT SERVICE.*

Seller agreed to provide consulting and support services as requested by Buyer at Seller's standard fee schedule in effect at that time.

§12. *WARRANTIES.*

(a) Seller represents and warrants to Buyer that as of the date of delivery:

(i) Seller has good and merchantable title to and the right to sell and/or license the System as the case may be as provided for in this Agreement, free and clear of all security interests, liens and encumbrances.

(ii) The System is designed in accordance with this Agreement.

(iii) The System is comprised of all of the hardware, software and related equipment agreed to herein.

(iv) Buyer shall receive any repair or replacement warranties extended by the manufacturer or supplier to Seller in connection with the System.

(b) Seller further warrants and covenants that for a period of one year following the System Acceptance Date:

(i) The Equipment will perform in accordance with the manufacturer's published specifications therefore.

(ii) The System will be free from defects in workmanship and material.

(iii) The System will have all of the qualities and features, and be capable of performing all of the functions described in the Specifications.

(iv) The System will be of merchantable quality, will be fit for the ordinary purposes for which such goods are used, and will pass without objection in the trade.

(v) The System will operate at an Effective Level of Performance of not less than 99%.

(c) During the one year following the System Acceptance Date, Seller will immediately and in no event later than 30 calendar days after notice, provide, at no charge to Buyer, corrections, modifications or additions to the System where Buyer notifies Seller in writing, of any errors, omissions, deficiencies or inconsistencies in the System, provided Buyer provides Seller access to the System via a dial-up modem. Buyer shall assist Seller in identifying these circumstances on which such errors, omissions, deficiencies or inconsistencies are discovered, and, if requested by Seller, shall document their existence.

(d) EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, THERE ARE NO EXPRESS WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION SET FORTH IN THIS AGREEMENT.

(e) IN NO EVENT SHALL SELLER BE LIABLE TO BUYER FOR LOSS OF PROFITS ARISING OUT OF ANY CLAIMED BREACH BY SELLER OF ITS OBLIGATIONS HEREUNDER.

§13. *PATENT AND COPYRIGHT INDEMNITY.*

(a) Seller warrants that the use of the System by Buyer pursuant to the terms hereof shall not constitute an infringement of any existing patent, copyright or other right. Seller hereby agrees to defend or settle any suit, proceeding or claim brought against Buyer based on a claim that the use of the System or any part thereof by Buyer constitutes an infringement of any existing patent, copyright or other right. Seller shall pay all damages or costs awarded against or expenses, including attorneys' fees, incurred by Buyer in such suit, proceeding or claim.

(b) In the event the System or any part thereof shall be in Seller's opinion likely to or shall become the subject of a claim for patent, copyright, or other infringement, subject to §13(c) hereof, Seller may, at its option and expense, and without diminishing Seller's obligations under §13(a) hereof, procure for Buyer the right to continue using such affected part of the System or modify such affected part to become noninfringing. Should Seller elect to remove or modify such infringing part of the System, Seller shall forthwith replace such part with a functionally equivalent noninfringing part and/or take other appropriate action to ensure that the System conforms to the Specifications to Buyer's satisfaction, without cost to Buyer.

(c) In the event that Seller shall refuse or shall be unable to supply or shall be prevented from supplying the System or any part thereof to Buyer, or in the event that Buyer's continued use of the System shall be prohibited or enjoined at any time, Seller shall promptly replace all affected parts of the System with functionally equivalent noninfringing parts and/or shall take such other action to ensure that the System conforms to the Specifications to Buyer's satisfaction, without cost to Buyer.

(d) Seller warrants that Buyer shall suffer no interruption of its normal business activities

or cycles as a result of any claimed infringement, any litigation referred to in §13(a) hereof or any replacement of items contemplated in §§13(b) or 13(c) hereof.

§14. *DEFAULT.*

(a) In the event Buyer shall default in any payment due under this Agreement, Seller may discontinue the installation of all further Equipment and Software contracted for hereunder, may demand and shall receive at Buyer's expense, return of all materials furnished by Seller for which Buyer shall not have tendered payment. Furthermore, Seller may pursue any additional or alternative remedies provided by law.

(b) If Buyer shall become insolvent, or if a petition for relief shall be filed by or against Buyer as bankrupt, insolvent or debtor under any federal or state bankruptcy, insolvency or reorganization laws and Buyer shall be unable, within 60 days after the commencement of any such proceeding to obtain the dismissal thereof, Seller shall be entitled to cancel any order then outstanding at any time during the period allowed for filing claims against Buyer's estate and Seller shall have such further remedies as provided for herein or by law.

(c) If Seller shall fail to meet the delivery, Preliminary Test, or training deadlines, set out respectively in §§6(a), 6(d) or 7 herein, or any agreed-upon extensions thereof, by more than 20 business days for causes not attributable to Buyer, Buyer may, at any time thereafter, at its option, terminate this Agreement by writing notice to Seller with no further obligation or liability on the part of Buyer.

(d) If the System Acceptance Test shall not be completed within 60 business days from completion of the Conversion for causes not attributable to Buyer, Buyer, at any time thereafter, at its option, may terminate this Agreement by written notice to Seller with no further obligation or liability on the part of Buyer.

(e) Buyer at its option may terminate this Agreement at any time, with no further obligation or liabilities on the part of Buyer, if Seller shall breach any material provision or warranty of this Agreement and shall fail to remedy such breach on a basis reasonably acceptable to Buyer within 30 days after the giving of written notice from Buyer reasonably specifying such breach.

(f) Buyer may forthwith terminate this Agreement, with no further obligation or liability on the part of Buyer, upon written notice to Seller if Seller shall become insolvent, or if a petition for relief shall be filed by or against the Seller as bankrupt, insolvent or debtor under any federal or state bankruptcy, insolvency or reorganization laws and the Seller shall be unable, with 60 days after the commencement of any such proceeding to obtain the dismissal thereof.

§15. *EFFECT OF TERMINATION PRIOR TO SYSTEM ACCEPTANCE DATE.*

In the event of the termination of this Agreement pursuant to the provisions of §§14(c), 14(d), 14(e) or 14(f) hereof prior to the System Acceptance Date, (a) Seller shall refund to Buyer all amounts previously paid by Buyer to Seller hereunder and (b) Seller shall remove and pay for the removal of the System from Buyer's offices. The remedies of Buyer provided for in this §15 and elsewhere in this Agreement are neither exclusive nor mutually exclusive and Buyer

shall be entitled to resort to any such remedy or any other remedy available at law or in equity, or some or all such remedies in any combination, at Buyer's discretion.

§16. *PERSONNEL.*

Seller will assign a designated employee to be primarily responsible for supervising the installation and testing of the System and the training of Buyer's employees with respect to the System. Buyer shall also have the right of prior approval of all other Seller personnel performing any of Seller's obligations hereunder who will have direct contact with Buyer's personnel or agents. Seller will replace within a reasonable time under the circumstances, any of its employees who may be engaged in performing its obligations under this Agreement whose removal is requested and reasonable cause for such removal is specified in writing by Buyer.

§17. *COMPATIBILITY SPECIFICATIONS.*

At all times following the System Acceptance Date, Buyer shall be at liberty to install or attach to the System any functionally compatible equipment and Seller shall provide Buyer such relevant compatibility specifications as are in the possession of or available to Seller, in such detail as Buyer may reasonably require. Such compatibility specifications will become a part of the Specifications.

§18. *FORCE MAJEURE.*

No party shall be liable for delay in performance hereunder due to causes beyond its control including, but not limited to, acts of God, fires, strikes, delinquencies of manufacturers or suppliers or acts of war. However, each party undertakes to minimize any such delay to the extent possible. Notwithstanding the foregoing, it is understood that, absent the specific agreement of Buyer, Buyer's rights pursuant to §§14(c) and 14(d) shall only be delayed for a maximum of 60 days by reason of the provisions of this §18.

§19. *COMPLIANCE WITH LAWS.*

(a) Buyer shall, at its own expense, use the Software in a careful and proper manner and shall comply with and conform to all laws, ordinances and regulations in any way relating to the possession, use and/or maintenance of the Software.

(b) The Software license is granted solely for Buyer's use in the United States of America. Unless specifically authorized in writing by Seller, Buyer shall not export, or in any way transfer the Software to any destination outside said country in which it was originally licensed. Regardless of any disclosure made by Buyer to Seller of an ultimate destination of the Equipment and/or Software, Buyer shall not export either directly or indirectly, the System without first obtaining a license to reexport from the United States Government, as required, and will comply with United States Government export regulations, as applicable.

§20. *SELLER'S NOTIFICATION OF LACK OF REPRESENTATION.*

(a) Buyer acknowledges that Seller is not a representative, agent, commission sales agent, commissionaire, servant or employee of its suppliers for any purpose. Subject to the

terms of this Agreement, Buyer acknowledges that it is not relying upon any representations made by Seller's suppliers in entering into this Agreement with Seller (except for any Equipment and/or Software maintenance which any supplier may have agreed to provide). Seller has no right or authority to create any obligation or responsibility on behalf of its suppliers except as may from time to time be provided by written instrument signed by said suppliers.

(b) SUBJECT TO THE TERMS OF THIS AGREEMENT, IN NO EVENT SHALL SELLER'S SUPPLIERS BE LIABLE TO BUYER FOR LOSS OF PROFITS ARISING OUT OF ANY CLAIMED BREACH.

§21. MISCELLANEOUS.

(a) Buyer may sell and lease back the Equipment and Software from a third party for purposes of financing provided that Buyer remains responsible for performance of its obligations under this Agreement.

(b) No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior or subsequent breach of the same provision or a waiver of any breach of any other provision. No waiver shall be effective unless made in writing and signed by an authorized representative of each party hereto.

(c) This Agreement shall be governed by and construed and enforced according to the laws of the State of Illinois. This Agreement contains the entire, integrated Agreement between the parties, and shall be binding upon both parties and their respective heirs, successors and permitted assigns. Seller will not assign this Agreement without first obtaining the written consent of Buyer.

(d) This Agreement shall become binding and effective as of the date hereof.

(e) Section headings are inserted for convenience only and shall not be used in any way to construe the terms of this Agreement.

(f) If any immaterial provision of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.

(g) Except as otherwise provided, any notice, request, demand, consent or other communication provided or permitted hereunder will be deemed given on the date it is sent and will be in writing and delivered by personal delivery, by certified mail, or by ordinary mail, postage prepaid, addressed to the party for which it is intended at the party's address as indicated in the heading of this Agreement and until such time as either party has given the other notice of a change of address.

(h) In the event of any conflict or inconsistency between the provisions of this Agreement and the provisions of any exhibit or schedule annexed hereto or any document referred to herein including but not limited to any maintenance agreement for the System, the provisions of this Agreement will prevail and govern the interpretation thereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal

as of the date first written above.

^ABC INC.

Its: ^

By: _____

^DEF INC.

Its: ^

By: _____

^[Attach the Schedules and Exhibits Referred to in the Above
Agreements.]