



## NETSCOUT SYSTEMS, INC. Terms of Purchase

This agreement establishes the terms ("Terms of Purchase") under which Netscout Systems, Inc. and any of its subsidiaries and affiliates ("NETSCOUT") will purchase hardware ("Hardware") and license proprietary programs in object code, as well as any firmware residing on the Hardware ("Software") (collectively termed "Products") and will purchase services ("Services") from you (the "VENDOR"). Unless otherwise governed by a signed contract between NETSCOUT and VENDOR, only these Terms of Purchase will apply to purchases and licenses made by NETSCOUT in connection with a purchase order (the "PO") referenced, or accompanied, by these Terms of Purchase, or that incorporate these Terms of Purchase by reference.

If VENDOR wishes to reject or modify these Terms of Purchase and propose its own terms, VENDOR must reject the PO and notify NETSCOUT of such rejection as soon as practicable, but in any event not more than three (3) business days from the date of VENDOR's receipt of PO. Unless otherwise agreed by NETSCOUT in writing VENDOR's shipment of Products or commencement of Services under a PO shall be deemed an effective mode of acceptance of these Terms of Purchase. Any acceptance of the PO is limited to acceptance of the express terms contained on the face of the PO, and the terms contained herein. Any proposal for additional or different terms or any attempt by VENDOR to vary in any degree any of the terms contained in the PO or herein is hereby objected to and rejected.

**1. Right to Resell.** VENDOR acknowledges that the Products and Services acquired hereunder may be for NETSCOUT's internal use, or for resale to NETSCOUT's external customers ("Customers"). NETSCOUT is authorized to resell the Products and Services to Customers subject to contractual terms with such Customers, including price, as NETSCOUT may determine, provided that VENDOR shall not be liable for any obligations in such contractual terms that are inconsistent with these Terms of Purchase.

### **2. Shipment and Delivery**

(a) Unless otherwise agreed in writing or specified on the face of the PO, all Products shall be shipped to the designated shipping location: (i) Freight pre-paid and included for U.S. delivery locations or (ii) DDP (INCOTERMS 2010) for delivery locations outside the US.

(b) Products shall be packed by VENDOR in accordance with NETSCOUT's specifications or, if no such specifications are provided on the PO, in accordance with the specified carrier's requirements and the highest industry standards

(c) All shipments must contain an itemized packing slip that identifies, at minimum, a complete description of the Products shipped, the number of the applicable PO, quantity delivered packing slip number (as applicable), and any other information required in the PO specifications (including, but not limited to, bar codes, part numbers of NETSCOUT, the VENDOR or the manufacturer).

(d) Unless otherwise directed by NETSCOUT, VENDOR shall deliver Products to NETSCOUT's receiving department during normal business hours. Quantities and delivery schedules for Products shall be as specified on the PO. NETSCOUT shall have no liability or obligation for any excess quantities shipped by VENDOR.

### **3. Acceptance**

(a) All Products and Services shall be subject to reasonable inspection and acceptance by NETSCOUT and NETSCOUT shall have the right to reject any non-conforming Products or Services at no cost to NETSCOUT.

(b) Title to Hardware shall pass to NETSCOUT immediately upon the earlier of (i) acceptance by NETSCOUT or (ii) shipment to the Customer.

### **4. Pricing and Payment**

(a) VENDOR's prices are inclusive of all costs (including, without limitation, set-up, testing and tooling costs and non-recurring engineering expenses, shipping costs) incurred by VENDOR in connection with the development or manufacture of Products and delivery to the specified destination. Unless NETSCOUT provides VENDOR with a valid reseller or exemption certificate NETSCOUT will pay or reimburse VENDOR for taxes (exclusive of taxes on VENDOR's income) arising from, or measured by, amounts payable to VENDOR under the PO.

(b) Unless otherwise expressly agreed in writing, NETSCOUT will remit payment to VENDOR within forty-five (45) days from the later of NETSCOUT's receipt of: (i) an undisputed invoice, (ii) the delivery of Products or (iii) notice that Services have been completed.

(c) VENDOR shall invoice, and NETSCOUT will remit payment, in the currency reflected on the face of the PO.

(d) Each VENDOR invoice shall, at minimum, list: (i) a complete description of the Products delivered and/or Services completed, (ii) the number of the applicable PO (iii) quantity of each item delivered, (iv.) price matching PO price for each item invoiced (v.) any applicable sales, use or value added taxes. Applicable taxes must be invoiced as a separate line item, concurrently with the amounts for the Products and or Services to which such taxes apply. NETSCOUT WILL NOT BE LIABLE FOR TAXES INVOICED RETROACTIVELY.

(e) VENDOR shall be responsible for remitting all amounts paid by NETSCOUT for taxes to the appropriate authorities and shall defend, indemnify and hold NETSCOUT harmless for any and all taxes, and all liability, damages, costs, fines and penalties incurred due to VENDOR's failure to remit any such taxes after being paid for the same by NETSCOUT.

(f) NETSCOUT will reimburse VENDOR for any pre-approved travel expenses in accordance with its Vendor Travel & Expense Reimbursement Policy (available at: <https://www.netscout.com/sites/default/files/2019-04/NETSCOUT-Vendor-Travel-Policy-April-2019.pdf>).

(g) Any invoice for reimbursement of any pre-paid amounts must be accompanied by satisfactory documentation, including any invoice that includes pre-paid freight charges, which must be accompanied by a copy of the carrier's freight bill. NETSCOUT may decline payment of any undocumented charges. Any credits or discounts shall be computed on the total invoice amount unless otherwise mutually agreed.

### **5. Purchase Order Cancellation**

(a) NETSCOUT may cancel the PO, or any delivery thereunder, in whole or in part, for any reason at its convenience and at any time prior to shipment of the applicable Products or commencement of Services, upon written notice to VENDOR. Upon receipt of such notice, VENDOR shall immediately cancel any applicable shipments and/ or cease performance of applicable Services. Except for the obligation to remit payment for any Products or Services not subject to the cancellation, NETSCOUT shall not be liable to VENDOR for any penalties or other charges of any kind whatsoever in the event of such cancellation.

(b) If VENDOR wishes to reject the PO, it shall so notify NETSCOUT in writing of such rejection in no less three (3) business days of receipt of PO, stating its reason for such rejection. NETSCOUT may, in its reasonable discretion, reject any such request to terminate,

(c) Termination of the PO by either party shall not prejudice the right of either party to recover any monies or require performance of any obligations due at the time of such termination.

## **6. Warranties.**

(a) Product Warranty Unless otherwise expressly agreed by NETSCOUT in writing, VENDOR warrants that all Products shall, (a) be new and free from defects in design, material, workmanship and programming, (b) conform in all material respects to the manufacturer's published specifications, any statements made on the containers or labels or advertisements any other written specifications, drawings and samples agreed to by the parties in writing or provided to VENDOR by NETSCOUT (individually or collectively, "Product Specifications"), and (c) be merchantable, safe and appropriate for the purpose for which Products of that kind are normally used. For any Products that are not manufactured by VENDOR, VENDOR will pass through the manufacturer's warranties to NETSCOUT and provide all reasonable assistance to NETSCOUT as required to facilitate repair or replacement of Products under such warranties.

(b) Services Warranty VENDOR warrants that: (i) all Services will be performed with due diligence and in a safe, workmanlike and competent manner and in accordance with VENDOR's published service descriptions or any written specifications agreed to by the parties in writing ("Service Specifications") and all and other requirements of the PO, the applicable statement of work or work order (collectively, "Work Order"), these Terms of Purchase and applicable law.

(c) VENDOR further warrants that, prior to performing the Services, (i) VENDOR has obtained or shall obtain, at its expense, all the necessary certificates, permits, licenses, and authorizations to conduct business and perform the Services, and (ii) VENDOR shall ascertain whether the Service Specifications are at variance with applicable law and good engineering and operational practices, notify NETSCOUT of such variances, and with NETSCOUT's agreement ensure that the necessary changes are made.

(d) VENDOR's warranties hereunder shall extend to NETSCOUT, its successors, assigns and Customers, and users of Products and Services sold by NETSCOUT.

(e) Remedies VENDOR, at its reasonable option and sole expense, shall (i) promptly repair or replace any non-conforming Products, (ii) reperform any non-conforming Services. If VENDOR fails to remedy non-conformance as set forth above, VENDOR shall reimburse NETSCOUT its costs of remedying such non-conformance including, but not limited to, obtaining replacement Products or Services from an alternate source (provided that NETSCOUT shall have sought VENDOR's prior written consent, which shall not be unreasonably withheld, conditioned or delayed, before incurring any such expense).

**7. Software Licensing.** Unless the parties enter into a separate licensing agreement for Software, the following license terms will apply to any Software provided by VENDOR under the PO:

(a) Subject to the restrictions set forth below, and payment of the applicable license fees, VENDOR and its third-party licensors (individually and collectively, the "Licensor") hereby grants NETSCOUT a perpetual, royalty-free, non-exclusive, irrevocable, world-wide license to use the Software for its own internal business purposes or to sublicense the Software to its Customers, provided that terms of any sublicense shall be no less restrictive than those set forth hereunder.

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(b) The Licensor retains all right, title, and interest in and to the Software and all copies thereof. No title to the Software, or any other intellectual property rights is transferred to NETSCOUT or the Customer other than as specified hereunder.

(c) Except as set forth hereunder or otherwise required by law, NETSCOUT may not, and will not cause or knowingly permit others to, derive the Software source code, reverse engineer, disassemble or de-compile, create derivative works, lend, lease, rent, assign the Software, or make it available for timesharing.

(c) Any violation of the foregoing restrictions may be cause for Licensor's immediate termination of the licenses granted hereunder.

(d) If NETSCOUT or its Customer, agrees to a separate license agreement for the Software, the terms of that license agreement shall apply to the Software and the terms of this section 7 shall be void.

**8. Confidential Information.** VENDOR shall consider all information furnished by NETSCOUT to be confidential and shall not disclose any such information to any other person, or use such information itself for any purpose other than performing this contract, unless VENDOR obtains expressed written permission from NETSCOUT to do so. This paragraph shall apply to drawings, specifications, or other documents prepared by VENDOR for NETSCOUT in connection with the PO. VENDOR shall not advertise or publish the fact that NETSCOUT has contracted to purchase Products, Services or Deliverables from VENDOR, nor shall any other information relating to the PO be disclosed to any third party without NETSCOUT's expressed written permission. Unless otherwise agreed in writing, no commercial, financial or technical information disclosed in any manner or at any time by VENDOR to NETSCOUT shall be deemed secret or confidential and VENDOR shall have no rights against NETSCOUT with respect thereto except such rights as may exist under patent laws.

## **9. Intellectual Property.**

(a) Work Made for Hire. Any copyrightable works, ideas, discoveries, inventions, patents, goods, or other information (collectively "Deliverables") developed in whole or in part by or on behalf of NETSCOUT in connection with or relating to Services shall be the exclusive property of NETSCOUT. VENDOR grants to NETSCOUT any Deliverables hereunder. VENDOR agrees that such Deliverables are works made for hire exclusively for NETSCOUT under the copyright laws of the United States ("U.S.") and any similar laws of other jurisdictions, and VENDOR hereby assigns to NETSCOUT all copyrights, patents, title and interest, and other proprietary rights it may have in such Deliverables (including the right to reproduce, modify, display, produce derivative works of, translate, sell, use, and the right to copyright and to register a copyright). To the extent that any of the Deliverables are deemed other than works made for hire, VENDOR hereby irrevocably assigns to NETSCOUT and agrees that NETSCOUT will be the exclusive owner of all right, title, and interest in and to such Deliverables, including all patent, copyright, trade secrets, and other proprietary rights therein.

(b) VENDOR will indemnify, defend, hold harmless, or settle any claim or action brought against NETSCOUT, its subsidiaries, affiliates, officers, and directors from all claims, losses, liabilities, costs, expenses, or damages (including reasonable attorneys' fees) of any third party (collectively, "Claims") to the extent such Claim:

(i) is based on an allegation that the Products, Services or Deliverables, or any portion of them infringes or violates any patent, copyright, trademark, or trade secret of a third party, and will indemnify and hold NETSCOUT harmless from and against any damages, costs, and fees reasonably incurred (including reasonable attorneys' fees).

fees) that are attributable to such Claim or action. NETSCOUT will provide VENDOR with: (i) prompt written notification of the Claim; (ii) sole control and authority over the defense or settlement thereof; and (iii) all available information, reasonable assistance, at VENDOR's expense, and authority to settle and/or defend any such Claim, provided however that VENDOR will seek NETSCOUT's consent (not to be unreasonably withheld) before acquiescing in any judgement or entering into any settlement which would likely result in reputational harm to NETSCOUT, admits fault on the part of NETSCOUT, or creates liability on the part of NETSCOUT.

(ii) arises or results from any intentional misconduct or negligent act or omission of VENDOR or its personnel in the performance of Services that results in personal injury, death, or tangible property damage,

(iii) arises or results from the negligence of, or misrepresentations by VENDOR or its personnel, or the breach by VENDOR or its personnel of any of its obligations under these Terms of Purchase, the PO or any Work Order.

(iv) arises or results in any way from any defect in the Products or Services. The indemnification in this subsection (iv) shall be in addition to the warranty obligations of VENDOR.

(c) **Limited Remedies for infringement** If any Product, Service or Deliverable ("Infringing Item") becomes, or in the opinion of VENDOR is likely to become, the subject of an infringement Claim or action, VENDOR will: (i) procure, at no cost to NETSCOUT, the right to continue using the Infringing Item(s) (ii) replace or modify the Infringing Item(s) to render it(them) non-infringing, provided there is no material loss of functionality; or (iii) if, in VENDOR's reasonable opinion, neither (i) nor (ii) above is commercially feasible, accept return of the Infringing Item(s) and refund the amounts paid to VENDOR by NETSCOUT for the Infringing Item(s).

#### **10. Limitation of Liability/Insurance**

(a) **LIABILITY LIMIT** NETSCOUT'S LIABILITY FOR ANY CLAIM ARISING UNDER THE PO, REGARDLESS OF THE FORM OF ACTION, WILL NOT EXCEED THE AGGREGATE FEES ACTUALLY PAID TO VENDOR FOR THE PRODUCT(S), SERVICES OR DELIVERABLE(S) THAT GAVE RISE TO SUCH CLAIM.

(b) **INDIRECT DAMAGES** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT WILL NETSCOUT BE LIABLE FOR INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING FROM THE PO, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUES, LOSS OF PROFITS, LOSS OF GOODWILL OR REPUTATION, LOSS OF DATA, OR FOR COSTS OF BUSINESS INTERRUPTION OR SUBSTITUTE PRODUCTS OR SERVICES, EVEN IF ADVISED OF THE LIKELIHOOD OF SUCH LOSS OR DAMAGES. VENDOR WILL NOT BE ENTITLED TO COMPENSATION FOR GOODWILL CREATED FOR NETSCOUT OR FOR LOSS OR DAMAGE FROM INVESTMENTS MADE THAT CANNOT BE EARNED BACK.

(c) **VENDOR's Employees** In the event that VENDOR's obligations under the PO require or contemplate performance of Services by VENDOR's employees, or persons under contract to VENDOR, to be done on NETSCOUT's or a Customer's property, the VENDOR agrees that the persons performing such Services shall not be considered employees of NETSCOUT.

(b) **Insurance** VENDOR will maintain insurance on terms and in amounts that will adequately cover losses or liabilities that arise  
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from or relate to: (a) VENDOR's personnel, agents, or based upon their terms of employment, or their rights to disability or workers' compensation or other similar rights; (b) damages that may be awarded arising from or relating to any intentional, reckless, or negligent conduct by VENDOR or its personnel, agents, subcontractors or consultants; and (c) damages or losses that may arise from the negligent or accidental conduct of VENDOR or its personnel, agents, subcontractors or consultants. NETSCOUT will not be responsible for loss or damage to VENDOR's personal property while on NETSCOUT or Customer site, even if such loss or damage occurs during VENDOR's performance of its obligations hereunder. VENDOR will identify NETSCOUT as an additional insured under all such policies of insurance and, if requested, before commencing performance of the Services, provide NETSCOUT with certificates evidencing the above coverages and identifying NETSCOUT as an additional insured. All applicable policies must provide primary, non-contributory coverage to NETSCOUT for claims arising out of the contractual relationship and include a waiver of subrogation in favor of NETSCOUT.

#### **11. Vendor Compliance**

(a) VENDOR shall comply, and remain in compliance, with NETSCOUT's Vendor Code of Conduct (available at <https://www.netscout.com/sites/default/files/2019-04/NTCT-Vendor-CoC-April-2019.pdf> in its provision of Products and Services hereunder.

#### **(b) Data Privacy**

(i) VENDOR acknowledges that NETSCOUT is subject to certain privacy and information security laws and regulations, pursuant to which NETSCOUT is required to ensure that its vendors appropriately safeguard personal, financial, or health information regarding NETSCOUT's former, current or prospective customers and employees ("NETSCOUT Sensitive Data"). To the extent that VENDOR receives any NETSCOUT Sensitive Data as a result of any exchange of information, delivery of Products or performance of Services under these Terms of Purchase, VENDOR agrees that it will comply with all applicable local, state, federal and international laws and regulations and amendments or changes thereto concerning privacy and information security, including but not limited to, to the extent applicable, General Laws of Massachusetts, Part I, Title XV chapter 93 H, Security Breaches, Massachusetts 201 CMR 17, European Union 2016/679 General Data Protection Regulation (GDPR), Data Protection Act 1998, Data Security Standards, version 2.0, Gramm-Leach-Bliley Act of 1999, Privacy of Consumer Financial Information (12 CFR Part 30)

(ii) to the extent that any Services provided by VENDOR under these Terms of Purchase require the processing of personal data of citizens of the European Union which has been provided to VENDOR by NETSCOUT, NETSCOUT and the VENDOR agree that the terms of NETSCOUT's Vendor Data Processing Agreement (available at: [https://netscout.na1.echosign.com/public/esignWidget?wid=CBFC1BAA3AAABLb1qZhCRVqnvwB7RC1TdBpzu0DauPLLAy6n-1Mau3gVHoRTU6dNELmbFLqMrDD9k-9UgUoc\\*](https://netscout.na1.echosign.com/public/esignWidget?wid=CBFC1BAA3AAABLb1qZhCRVqnvwB7RC1TdBpzu0DauPLLAy6n-1Mau3gVHoRTU6dNELmbFLqMrDD9k-9UgUoc*)) shall apply with respect to the processing of any such personal data, unless and until VENDOR and NETSCOUT have executed a separate written data privacy agreement that is consistent with the requirements of the GDPR, in which case, the terms of that data privacy agreement shall apply.

(c) **Conflict Minerals** VENDOR warrants that, to its knowledge, no tantalum, tin, tungsten and/or gold ("Conflict Minerals"), contained in any Product originated from, or directly or indirectly finances or benefits armed groups that are perpetrators of serious human rights abuses in the Democratic Republic of the Congo or an adjoining country, unless the Conflict Minerals were processed by a facility listed as compliant pursuant to the CFSI Conflict-Free

Smelter Program. VENDOR agrees to abide by the terms and conditions in NETSCOUT's Conflict Minerals Policy Statement (available at <https://www.netscout.com/corporate-responsibility/conflict-minerals>), and to communicate to its sub-suppliers its own commitment to responsible sourcing and legal compliance. VENDOR agrees to cooperate and work with its sub-suppliers in an attempt to ensure traceability of Conflict Minerals at least to smelter or refiner level, to maintain and record all Conflict Minerals traceability documentation for five years, and to provide such documentation to NETSCOUT upon request.

(b) Slavery and Human Trafficking VENDOR certifies that VENDOR's organization and any sub-products and materials incorporated into the Products comply with all laws and standards regarding slavery and human trafficking in the locations in which VENDOR conducts business.

(c) NETSCOUT is an equal opportunity employer and a federal contractor or subcontractor. Consequently, the parties agree that, as applicable, they will abide by the requirements of 41 CFR 60 - 1.4(1), 41 CFR 60 – 300.5 and 41 CFR 60-741.5(a) and that these laws are incorporated herein by reference. These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex or national origin. These regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability. The parties also agree that, as applicable each will abide by the requirements of Executive Order 13496 (29 CFR Part 471, Appendix A to Subpart A), relating to notice of employee rights under federal labor laws. For the avoidance of doubt, any amendments made to the laws and requirements set forth in the paragraph above are automatically incorporated herein.

## **12. General.**

(a) Assignment VENDOR may not assign or otherwise transfer the PO, these Terms of Purchase or any of its obligations to any third party without the prior written consent of NETSCOUT.

(b) Governing Law & Jurisdiction These Terms of Purchase and any contract formed hereunder, shall be governed by, and construed under the internal laws of the Commonwealth of Massachusetts, without regard to principles of conflict of law, as the same may be from time to time in effect, including, without limitations the Uniform Commercial Code as in effect in the Commonwealth of Massachusetts, and VENDOR hereby submits to the exclusive jurisdiction of the federal and state courts located in said Commonwealth and the applicable service of process.

(c) No Waiver No waiver of any provision of these Terms of Purchase will constitute a waiver of any other provision or of the same provision on another occasion. If any term of hereunder is held by a court of competent jurisdiction to be illegal, invalid, or unenforceable, such term may be reduced in scope by the court to the extent the court deems necessary to render the provision enforceable, provided that the intent of the parties is not substantially impaired.

(d) Entire Agreement The PO and these Terms of Purchase, along with any Work Order duly executed by both parties (if applicable) constitute the entire agreement between the parties and supersedes any previous oral or written understandings, commitments, or agreements pertaining to the subject matter of the PO.