

# Questionmark Standard Terms and Conditions for Training, Consulting and Services

## Definitions.

Unless otherwise defined herein, all capitalized terms referenced herein shall have the definitions prescribed in the License Agreement to which these Standard Terms and Conditions for Training, Consulting and Services (this "Agreement") apply.

"Customer" shall mean the individual or entity that is specified on the Applicable Invoice (as defined in the License Agreement) as having purchased a license to use the software (the "Licensee") and/or any sub-licensee of the Licensee.

"Commencement Date" shall mean the date on which the quotation is accepted.

"Questionmark" shall mean Questionmark Corporation of 260 Madison Avenue, 8th Floor, New York, NY 10016, USA.

## Services.

Questionmark shall provide to Customer the consulting and/or training services (the "Services") listed in the Statement of Work (the "SOW") referenced by the quotation and/or invoice. The Services shall be performed and delivered at the times and places listed in the SOW. The SOW may only be modified by mutual agreement and in writing. Customer acknowledges that in the performance of the Services, Questionmark may require the disclosure by Customer of certain information, or access to certain of Customer's computer systems or databases. Customer agrees to provide Questionmark all access reasonably requested to enable Questionmark to complete the Services in the time specified in the SOW. Questionmark will have no liability for any failure to comply with the timing set forth in the SOW caused by or arising out of Customer's failure or delay in providing necessary information or access. Customer acknowledges and agrees that Questionmark has only a general knowledge of the Customer's business and does not have expertise in the Customer's business and operational needs and requirements. Further, Customer acknowledges and agrees that it is in the best position to determine the operational needs and requirements for Customer's business. As a result, Customer acknowledges and agrees that it is Customer's responsibility to confirm that the SOW satisfies the operational needs and requirements of Customer's business and to identify any modifications to the SOW required to conform to the operational needs and requirements of Customer's business.

In the event the Services require Questionmark to develop software, Customer agrees that upon the delivery of such newly developed software ("Deliverable"), Customer shall have ten (10) business days to review such software for any material non-conformance with the terms of the SOW. In the event Customer does not report any such material non-conformance to Questionmark within the ten (10) day period, Customer will have been deemed to have accepted such Deliverable and Customer waives and releases Questionmark from and against any claim, liability, damage, demand, cost and/or expense, or suit arising from or related to such Deliverable developed by Questionmark on behalf of the Customer. In the event the Deliverable is not in material conformance with the terms of the SOW, Questionmark shall remedy such material non-conformance so as to bring it into material compliance with the SOW.

## **Customer's Responsibility to Participants.**

Customer acknowledges that the software may be used to assess a participant's knowledge, skills and attitudes and allocate a score. The score should be considered one piece of evidence about a participant's knowledge, skill and/or attitude. When the software is being used to make decisions about a participant, Customer should review and evaluate the score to ensure that the appropriate decision has been made. Customer acknowledges and agrees that Customer is solely responsible for use of the software, including entering and maintaining the assessment material, checking this material, checking scores, checking reports, and using the software fairly. Should Customer use the software to deliver high stakes assessments, or other kinds of assessments, which are used to make important decisions about people, Customer acknowledges that Customer has a responsibility to thoroughly review and evaluate the materials, scores, and reports produced by the software, to ensure that the appropriate decisions are being made. Customer shall indemnify and hold Questionmark and/or its licensor harmless from any and all claims, liabilities, damages, costs and/or expenses, and suits arising out of the use of the software or use of the scores to determine decisions relating to participants, including but not limited to any and all claims, liabilities, damages, costs and/or expenses, and suits arising from, related to, or caused by any employment decisions, whether favorable or adverse in nature or effect, made by Customer based upon Customer's use of the software or scores produced from Customer's use of the software or the Customer's use of the Deliverable, including but not limited to employment termination or discharge, or discipline; employee compensation; and/or employment promotions or advances.

## **Term.**

The term of this Agreement shall commence on the Commencement Date and shall continue for one (1) year plus any initial fractional month. If the Commencement Date shall fall on a day other than the first day of the month, the term shall be deemed to include the twelve (12) full months next following the date of commencement.

## **Charges and Billing.**

Customer shall pay to Questionmark the fees listed in the invoice referencing the SOW for the consulting and training services to be conducted by Questionmark. Billing shall be in advance. All amounts are in United States dollars to be paid to Questionmark Corporation. Payments not received by Questionmark within thirty (30) days of the date of invoice shall be subject to a late charge of one and a half percent (1.5%) per month. Questionmark shall be under no obligation to provide any services hereunder if Customer is in default of Customer's payment obligations.

## **Changes in Terms, Conditions, and Fees.**

Questionmark may change the fees and/or the terms or conditions governing the provision of Services to Customer on ninety (90) days notice. Customer may, by sixty (60) days written notice to Questionmark, terminate this contract on the effective date of any such change. If such notice of termination is not received by Questionmark within thirty (30) days of the date of the notice sent by Questionmark, the change shall be deemed accepted by Customer and Customer waives and relinquishes any and all claims against Questionmark arising from or related to Questionmark's change in the fees and/or terms and conditions governing the provision of Services to Customer.

## **Confidential Information.**

All information relating to Customer that is known to be confidential or proprietary, or which is clearly marked as such, will be held in confidence by Questionmark and will not be disclosed or used by Questionmark except to the extent that such disclosure or use is reasonably necessary to the performance of the Services.

All information relating to Questionmark that is known to be confidential or proprietary, or which is clearly marked as such, will be held in confidence by Customer and will not be disclosed or used by Customer except to the extent that such disclosure or use is reasonably necessary to the performance of Customer's duties and obligations under this Agreement.

Customer acknowledges and agrees that the documentation related to this Agreement is the confidential property of Questionmark or its licensors. For purposes hereof, "Confidential Information" includes, but is not limited to, the terms and conditions hereof, Questionmark Perception or OnPremise documentation, Specifications, and other information of Questionmark which is disclosed orally or visually and relates to source code or internal methods of operation including, without limitation, application program interfaces.

These obligations of confidentiality will extend for a period of three (3) years after the termination of this Agreement but shall not apply to information that: (i) is in the possession or control of the recipient at the time of its disclosure hereunder; (ii) is, or becomes publicly known, through no wrongful act of the recipient; (iii) is received by the recipient from a third party free to disclose it without obligation to the discloser; or (iv) is independently developed by the recipient without reference to the Confidential Information of the discloser. The Customer and Questionmark acknowledge and agree that Confidential Information shall only be disclosed to their respective employees and agents on a "need to know basis" in connection with performance under this Agreement.

## **Intellectual Property.**

Questionmark will retain ownership of all proprietary rights to the Deliverable developed pursuant to this Agreement, including certain rights, if any, that Questionmark has pursuant to a license from another party. Upon full payment of the fees set forth in this Agreement, Questionmark will grant to Customer a license to install and use the Deliverables in Customer's own business in accordance with Questionmark's Standard License Agreement as executed by Customer.

Questionmark is the owner, licensee or sub-licensee of various pre-existing development tools, routines, subroutines and/or other programs, data, and materials that Questionmark may use or implement in the development of the Deliverable ("Background Technology"). Questionmark retains all right, title and interest in and to the Background Technology, and hereby grants Customer a non-exclusive license to use the Background Technology only to the extent necessary to use the Deliverable. Customer is not authorized to sell or license any Background Technology or the Deliverable being produced under this Agreement.

## **Data Protection.**

The parties shall comply where applicable with their respective obligations as detailed in Schedule 1.

## **Taxes and Duties.**

There shall be added to the charges under this Agreement amounts equal to any tariff, duties, value added tax ("VAT"), and/or sales or use tax or any tax in lieu thereof imposed by any government or governmental agency with respect to the services rendered by Questionmark under this Agreement.

## **Support.**

Unless specified otherwise on the SOW, the Deliverable will not be covered by any Software Support Plan that may cover the licensed software.

## **Communications Responsibility and Costs.**

Customer will be responsible for costs of any modem and/or network connections at Customer's site and the associated line-use charges. Any modem or network access by Questionmark may be subject to Customer's approval and such access will be solely for the purpose of completing the Services required.

## **Travel and Hotel Expenses.**

Customer will reimburse Questionmark for any out-of-pocket expenses including travel to and from Customer's site, lodging, car rental, and meals incurred by Questionmark in its completion of the Services required hereunder. Questionmark shall provide to Customer itemized invoices, supported by original receipts for all such reimbursable expenses, which invoices must be paid by Customer within thirty (30) days of receipt.

## **Termination.**

In the event of termination of this Agreement all fees or charges payable hereunder for the entire term of this Agreement shall, without notice or demand by Questionmark, immediately become due and payable, and Questionmark's obligations under this Agreement shall immediately end. Questionmark may terminate this Agreement in the event of default by Customer. In the event of termination, then Questionmark will issue an invoice to Customer for the full value of the Services performed prior to termination. Such invoice will be immediately due and payable.

## **Warranty.**

Questionmark warrants that the Deliverable at the time of delivery will not knowingly infringe any US Patent, or infringe any third party copyright, trade secret, or other intellectual property rights. This warranty will not apply to any infringement that would not be such except for Customer's contributed design, software or other elements. Customer's exclusive remedy for the breach of the above warranty will be the re-performance of the Services within a commercially reasonable time.

## **Ancillary Software.**

Ancillary Software means software that is not part of the Deliverable but which is installed separately to run alongside the Deliverable and which has its own license agreement presented on install. Questionmark may provide Ancillary Software as part of providing its services and such provision is made as a convenience and such supply shall not be part of the Services or the Deliverables. The Customer acknowledges that Ancillary Code is subject to its own license terms and warranties. Nothing in this Agreement shall restrict the rights granted to Customer by a license for Ancillary Software applicable to any Deliverable, or part of a Deliverable, however, if

Customer exercises any modification rights granted by such a license, this may void any warranty provided by Questionmark and Customer's right to receive support and/or maintenance with regard to the Deliverable or the Services.

### **No other warranties.**

QUESTIONMARK AND ITS SUPPLIERS DISCLAIM ALL WARRANTIES AND CONDITIONS NOT EXPRESSLY CONTAINED HEREIN, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT, WITH REGARD TO THE SOFTWARE PRODUCT, AND THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT SERVICES. THIS LIMITED WARRANTY GIVES CUSTOMER SPECIFIC LEGAL RIGHTS. CUSTOMER MAY HAVE OTHERS, WHICH VARY FROM STATE/JURISDICTION TO STATE/JURISDICTION.

### **Customer's remedies.**

QUESTIONMARK'S AND ITS SUPPLIERS' ENTIRE LIABILITY AND CUSTOMER'S EXCLUSIVE REMEDY SHALL BE TO RETURN THE FEES PAID WITH RESPECT TO THE JUST-PRIOR THREE (3) MONTH PERIOD OR \$5,000, WHICHEVER IS GREATER.

### **Limitation of liability.**

IN NO EVENT SHALL QUESTIONMARK OR ITS SUPPLIERS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR ANY OTHER PECUNIARY LOSS) ARISING OUT OF THE USE OF OR INABILITY TO USE THE PRODUCT OR THE PROVISION OF OR FAILURE TO PROVIDE MAINTENANCE SERVICES, EVEN IF QUESTIONMARK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

### **Independent Contractor.**

The relationship of the parties is that of independent contractor, and nothing herein shall be construed to create a partnership, joint venture, franchise, employment, or agency relationship between the parties. Customer shall have no authority to enter into agreements of any kind on behalf of Questionmark and shall not have the power or authority to bind or obligate Questionmark in any manner to any third party.

### **Assignment.**

Customer may only assign this Agreement with Questionmark's permission.

### **Severability.**

If any term of this Agreement is found to be unenforceable or contrary to law, it will be modified to the least extent necessary to make it enforceable, and the remaining portions of this Agreement will remain in full force and effect.

### **General.**

This Agreement shall be binding upon the parties when the order is accepted by Questionmark Corporation at 260 Madison Avenue, 8th Floor, New York, NY 10016, USA, and will be governed by the laws of the State of Connecticut (without reference to that body of law known as conflicts of

laws) and without reference to the 1980 United Nations Convention on Contracts for the International Sales of Goods and any amendments thereto. Customer acknowledges that the software and technical services supplied by Questionmark under this Agreement are subject to the Export Control Regulations of the United States. Customer agree to provide any required assistance to Questionmark in complying with the export controls including, but not limited to, supplying a statement as to ultimate destination and complying with any import regulations. The terms and conditions stated herein supersede all prior Agreements between the parties relating to the subject matter of this Agreement. Any terms and conditions contained in a purchase order, request for proposal, order acceptance or similar document from the Customer shall not constitute a part of the contract of sale between the parties unless such terms and conditions are specifically incorporated in the applicable SOW. This Agreement may be changed or modified only in writing and signed by a corporate officer of Questionmark.

# Schedule 1 – Data Protection (EU General Data Protection Regulation)

This Schedule 1 ("Schedule") applies only if the SOW specifies that Schedule 1 – Data Protection (EU General Data Protection Regulation) is applicable. In this case, this Schedule shall apply from May 25, 2018 and only in respect of EU personal data that is subject to the General Data Protection Regulation (EU) 2016/679 ("GDPR"). Otherwise, this Schedule is not applicable and does not form part of the Agreement.

Questionmark may make changes to this Schedule at any time when required in accordance with updates to Data Protection Law and practice based upon the advice of its professional advisors. Questionmark will make any modified version of this Schedule available to Customer on its website, which modified version becoming applicable on its date of posting providing such modifications do not involve additional obligations on Customer. Any conflict or inconsistency between this Schedule and the other parts of this Agreement shall be resolved in favor of this Schedule in respect of the subject matter hereof.

## 1. Definitions

The following definitions shall apply for this Schedule:

"Data Protection Law" means the GDPR;

"Data processor", "data controller", "data subject", "personal data" and "processing" shall have the meanings given to such terms in Data Protection Law;

"Customer Personal Data" means all personal data that Questionmark processes on behalf of Customer in providing Services that is subject to Data Protection Law, which may include such data of Customer Affiliates that are subject to Data Protection Law and are permitted to use the Services.

"Subprocessor" means other processors engaged by Questionmark to process Customer Personal Data.

2. The subject-matter of the processing is providing Services involving the processing of Customer Personal Data. The duration of the processing is the term of this Agreement. The nature and purpose of the processing is to provide Services to Customer. The types of personal data are within the sole control and responsibility of Customer and include those specified in Article 4 GDPR and any other Customer Personal Data provided to Questionmark by Customer and answers and scores of Assessments. The categories of data subjects are solely determined by and the responsibility of Customer and typically include employees, students, contractors, candidates and other Participants in Assessments.

3. The Customer agrees that:



- 3.1 In respect of Customer Personal Data, Customer is the data controller and Questionmark is the data processor. Customer shall inform Questionmark if it acts as a joint controller with another party in respect of Customer Personal Data or if any Customer affiliates are data controllers, and provide contact details for its Data Protection Officer if appointed. Customer's obligations continue to apply for Customer Personal Data in respect of which a Customer affiliate is the data controller.
- 3.2 Customer shall be solely responsible for its compliance with Data Protection Law and all other laws applicable to Customer in using the Services including its use of Customer Personal Data. Customer confirms that it is permitted to transmit to Questionmark for processing under this Agreement all Customer Personal Data without breach of any law, agreement, arrangement or duty or the rights of any third party.
4. Questionmark shall take all measures required pursuant to Article 32 of the GDPR, taking into account the state of the art, costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons.
5. Questionmark will ensure that persons authorized to access Customer Personal Data have committed themselves to confidentiality even after their engagement ends.
6. When processing Customer Personal Data, Questionmark shall:
  - 6.1 Implement appropriate technical and organizational measures in such a manner designed to ensure that processing will meet the requirements of Data Protection Law and ensure the protection of the rights of data subjects. Questionmark represents that it is certified by a reputable third party against the ISO 27001 standard or a comparable successor standard and upon written request shall provide Customer with copies of its certificates and other reasonably requested documentation about its security.
  - 6.2 Only process Customer Personal Data upon Customer's instructions (including for operation and maintenance of the Services and as otherwise present in this Agreement), including regarding transfers of Customer Personal Data to a third country, unless required to do so by EU or EU member state law (including UK law) to which Questionmark is subject; in such case Questionmark shall inform Customer of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest. 'Customer's instructions' include the terms of this Agreement and an implicit direction that any Customer Personal Data sent to Questionmark is intended to be processed for investigation, troubleshooting or review purposes.
7. Questionmark may:
  - 7.1 Engage Subprocessors in accordance with this Agreement.
  - 7.2 Continue to use the Subprocessors engaged by it prior to 25 May 2018, subject to compliance with its obligations under Data Protection Law. Questionmark's current



organizational Subprocessors that may process Customer Personal Data are included within the list found at [www.questionmark.com/go/od-subprocessors](https://www.questionmark.com/go/od-subprocessors).

- 7.3 Not engage a new Subprocessor without Customer's prior general written authorization. Questionmark shall satisfy this obligation by updating its list of organizational Subprocessors at least 28 days prior to authorizing a new organizational Subprocessor to provide Customer with a means to obtain notice and opportunity to object. Customer provides general written authorization to Questionmark's present and future engagement of individual, natural person contractors who are under obligations of confidentiality, and may obtain notice of such contractors at any time by requesting a list from Questionmark. Any objections to a new Subprocessor must be received within 28 days of notification, otherwise Customer is deemed to accept the new Subprocessor. If Customer reasonably objects to a new Subprocessor and such objection cannot be satisfactorily resolved within a reasonable time, Customer may terminate this Agreement without penalty upon 30 days' written notice to Questionmark. If Customer's objection remains unresolved 30 days after it was raised and no notice of termination has been received, Customer is deemed to accept the new Subprocessor.
- 7.4 Notwithstanding clause 7.3, Customer agrees that Questionmark may engage a new Subprocessor in emergencies and situations outside of Questionmark's reasonable control, including natural disaster or financial distress of an existing Subprocessor, subject to Questionmark updating the lists of Subprocessors referred to in clause 7.3 as soon as is reasonably practicable.
8. Questionmark shall respect the conditions referred to in Article 28 GDPR paragraphs 2 and 4 for engaging another processor. Questionmark shall ensure all Subprocessors are bound by written agreements requiring them to adhere to the same data protection obligations in accordance with Article 28(3) GDPR, as required by Article 28(4) GDPR. Questionmark shall as between the Parties remain fully liable to Customer for any processing of Customer Personal Data by a Subprocessor.
9. Customer agrees that Questionmark may transfer Customer Personal Data to other countries (and process and provide access to such data in those other countries) for purpose of its provision of the Services, subject to Questionmark complying with its obligations in this Schedule 1, including clause 7, and providing that appropriate technical and organizational measures are implemented.
10. Questionmark shall taking into account the nature of the processing, assist Customer by appropriate technical and organizational measures, insofar as is possible, for fulfilment of Customer's obligation to respond to requests for exercising data subject rights laid down in Chapter III GDPR in accordance with this clause 10. The parties agree that the nature of the processing by Questionmark is such that provision of such assistance is inapplicable unless expressly agreed otherwise in a separate agreement.
11. Upon request Questionmark shall provide reasonable assistance to Customer in ensuring compliance with the obligations pursuant to Articles 32 to 36 GDPR taking into account the nature of processing and information available to Questionmark. Such assistance shall

be subject to Customer's payment of reasonable charges on a time and materials basis where the assistance required is not part of Questionmark's standard services then provided to all customers.

12. Questionmark shall notify Customer without undue delay after becoming aware of a personal data breach in respect of Customer Personal Data.
13. Questionmark shall maintain a record of all categories of processing activities carried out on Customer Personal Data by Questionmark on behalf of Customer required by Article 30(2) GDPR and make such record available to the supervisory authority on request.
14. Questionmark shall delete all Customer Personal Data after the end of the Services relating to processing, and delete existing copies unless EU law or EU member state law requires storage of the Customer Personal Data.
15. Questionmark shall make available to Customer on request all information necessary to demonstrate compliance with Questionmark's obligations in Article 28 GDPR and shall allow for and contribute to audits including inspections, conducted by Customer or another auditor mandated by Customer in relation to Questionmark's processing of Customer Personal Data. The Parties agree that this obligation shall be fulfilled by Questionmark's making available, upon request and subject to confidentiality obligations, Questionmark's then current independent third-party certifications and answering reasonable questionnaires from Customer. Additional audit requirements shall be subject to separate written agreement of the Parties.