

# Questionmark Terms and Conditions for providing Software Support and Consulting Services

These Terms and Conditions for Software Support and Consulting Services define the terms and conditions under which Questionmark provides software support and consulting services for existing Perception Server Software.

## Definitions.

"Applicable Invoice" shall mean a valid invoice to Customer from Questionmark or from an authorized Questionmark reseller referencing these Terms and Conditions

"Assessment" shall mean a systematic method of obtaining data, evidence or results, including but not limited to tests, examinations, questionnaires, and surveys.

"Commencement Date" shall mean the date set out on the Applicable Invoice.

"Consulting Services" means any consulting and/or training services provided by Questionmark to Customer as set forth in an Order.

"Customer" shall mean the individual or entity that is specified on the Applicable Invoice as having purchased a license to use the software.

"Designated Contacts" are the individuals that have been identified, attended a formal training course and are permitted to contact Questionmark for support

"Normal Business Hours" may be specified on the Applicable Invoice but otherwise shall mean 9:00 a.m. to 5:00 p.m. Central Standard Time on non-holiday weekdays.

"Order" means the written quotation or SOW provided by Questionmark for a specific Server Configuration for Perception Server Software and/or Software Support and/or Consulting Services that has been accepted by Customer.

"Participant" shall mean any person that participates in an Assessment by answering questions or otherwise responding to the Assessment process.

"Perception Server" shall be the Questionmark Perception Server software and its documentation for which support is being provided.

"Questionmark" shall mean Questionmark Corporation of 260 Madison Ave, New York, NY 10016, USA.

"Software Support Agreement" shall mean the combination of these Terms and Conditions and an Applicable Invoice.

"SOW" means a statement of work which defines the services to be provided, deliverables, fees, invoicing and payment terms.

"Term of Support" means the term of Software Support as stated in an Order or Applicable Invoice.

**Initial Term.** Unless otherwise specified on an Applicable Invoice, the initial Term of Support shall commence on the Commencement Date and shall continue for one (1) year, after which it shall renew for additional one (1) year terms unless terminated by either party at the end of the initial or an additional annual term on having provided written notice to the other party not less than ninety (90) days prior to the end of the current initial or additional term.

**Charges and Billing.** Charges for support services shall be in accordance with the quotation for such services. Billing shall be annually in advance. All amounts are in United States dollars to be paid to Questionmark. 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 or products if Customer is in default of Customer's payment obligations. Customer may only enter into the Software Support Agreement without extra charge at the time of purchase. After Customer's initial purchase, or if the Software Support Agreement shall lapse, a buy-in fee of thirty-seven and a half percent (37.5%) of the then current list price of Perception Server will be charged for the first year of Software Support provided Customer is licensed for the current version. Future versions may be licensed for an upgrade charge that is determined by Questionmark, in its sole discretion, at the time of the release.

**Changes in Terms, Conditions, and Fees.** Questionmark may change software support fees and/or terms and conditions on ninety (90) days notice to Customer but no such change shall be effective prior to the end of the initial one-year term. Customer may, by not less than thirty (30) days written notice to Questionmark, terminate this Software Support Agreement on the effective date of any such change. If such notice of termination is not received by Questionmark within fifteen (15) 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 Software Support to Customer.

**Taxes and Duties.** There shall be added to the Software Support Agreement fees 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 the Software Support Agreement.

**Customer Responsibilities.** Customer agrees to communicate with Questionmark in English unless otherwise agreed. Customer agrees to provide Questionmark with log and data files, as requested, and with access to; and sufficient support, and test time, on Customer's computer system to duplicate the problem, certify that the problem is with the Questionmark's software, and to certify that the problem has been fixed.

Customer agrees to advise Questionmark of the contact details for its Designated Contacts and such Designated Contacts shall subscribe themselves to Questionmark's support systems for alerts. Questionmark will have no responsibility to provide support to non-Designated

Contacts. Designated Contacts may be changed from time to time but not more frequently than every 3 months, at no charge. However, the number of Designated Contacts shall not exceed the number specified on the Order.

Customer agrees to promptly install new releases, hot fixes and service packs of covered software and agrees that failure to promptly install these releases shall release Questionmark from its support obligations under the Software Support Agreement until such time as these releases are installed.

Customer will be responsible for maintaining a platform, hardware, database management system ("DBMS"), operating system, security systems, intrusion detection, virus detection, and network compatible with the installed version of the Perception Server Software, including newly released versions. Questionmark is not responsible for maintaining or supporting the Perception Server Software unless it is hosted by a supported platform.

Customer must inform Questionmark in writing of any modifications made to the software. Questionmark shall have no obligation under the Software Support Agreement to maintain such modified portions of the software or to maintain portions of the software affected by the modified portions of the software. Corrections for difficulties or defects traceable to customer errors or system changes will be billed at standard Questionmark time and material rates.

Basic Software Support Services provided. Particular software covered under the Software Support Agreement will be as indicated on the Applicable Invoice. During the Term of Support, Questionmark will correct or replace software and/or provide services necessary to remedy or avoid any programming error, to the extent such programming error is caused by Questionmark, and which significantly affects use of the software. Such correction, replacement, or services will be accomplished after Customer has identified and notified Questionmark of any such error in accordance with Questionmark's reporting procedures.

During the Term of Support, Customer's contacts that are subscribed to Questionmark's communities will receive:

1. New releases of covered software (not charged as options) as they are released by Questionmark;
2. Technical or operational assistance in English for up to three (3) Designated Contacts via email and phone up to a maximum of twenty (20) person-hours per month without accumulation of hours from one month to the next during Normal Business Hours; and
3. Free access to the Questionmark's online knowledge bases, manuals, Best Practice Guides and White Papers.
4. Free Access to Questionmark's RSS news feeds for product and technical support information.
5. Opportunity to send employees to Questionmark's User Conference at the prevailing rate for customers with a software support agreement.

Enterprise Software Support Services. If Customer purchases Enterprise Level Support the following services, in addition to the Basic Software Support Services, will be made available during Normal Business Hours:

1. **Dedicated Technical Support Representative.** Questionmark will use commercial reasonable efforts to allocate a Dedicated Technical Support Representative for Customer to work with on an ongoing basis. Notwithstanding the foregoing, Questionmark reserves the right to delegate to, or allocate, another Questionmark representative to assist Customer in the event that the Dedicated Technical Support Representative is unavailable for any reason.
2. **Retain System Profiles.** Customer will provide details of their system configuration and product usage to Questionmark and Questionmark will retain this information, and Customer hereby grants Questionmark permission to retain this information for the Dedicated Technical Support Representative, and other Questionmark representatives, if appropriate, to have easy access to assist with problem diagnosis and resolution. Customer may provide Questionmark with this information in any manner or form, including but not limited to, phone, email or web based forms.
3. **Service Level Agreements (SLAs).** Customer agrees to commit the required resources during its normal business hours to assist Questionmark with reproducing and resolving any error(s) and/or issue(s), obtaining and installing patches, and/or using a workaround to reduce the severity of the error. Questionmark agrees to use commercially reasonable efforts to work with the Customer to resolve the issue in accordance with the specifications of the SLA. Customer and Questionmark acknowledge and agree that reasonable and timely efforts must be made by all parties involved for a timely resolution. If Customer fails to communicate with Questionmark, without notice, for a period of three (3) business days, then Questionmark may, upon notice, close the support incident due to Customer's inactivity. A support incident may be reopened upon Customer's request within thirty (30) consecutive days of closure, however, once a Service Request is closed for more than thirty (30) consecutive days, the issue will be considered permanently closed, and it cannot be reopened. If further work is necessary, a new service request will be opened, and all pertinent information, data and materials may need to be resubmitted before work can continue and all previous support benchmarks are reset. Questionmark will set Severity levels at its sole discretion and will use commercially reasonable endeavors to respond to service requests according to the following priorities and response times:
  - a. "Severity 1 issue" means an error isolated to the Questionmark Product that renders the product inoperative or causes the product to fail catastrophically, i.e. major system impact or system outage. This issue must be resolved before the Customer can utilize the Questionmark Product. All Severity 1 issues have no workaround and Customer and Questionmark shall work closely together in order to resolve the error as soon as possible.
    - i. Initial Response Time (by email or callback) is within four (4) hours during Normal Business Hours.
    - ii. Maximum Time Between Updates (by email or callback or implementation in System) is four (4) hours during Normal Business Hours.
  - b. "Severity 2 issue" means an issue which causes a serious impairment to a

critical feature of the Questionmark Perception application, but where overall functionality is not interrupted. Usually a workaround is available for this type of issue, but such is not always the case. Questionmark will resolve all Severity 2 issues as soon as possible.

- i. Initial Response Time (by email or callback) is within eight (8) hours during Normal Business Hours.
      - ii. Maximum Time Between Updates (by email or callback or implementation in System) is four (4) Hours during Normal Business Hours during the first three (3) business days and then updated as needed thereafter.
    - c. "Severity 3 issue" means an issue that causes the failure of a non-critical aspect of the Questionmark Perception application and a satisfactory work-around already exists but the presence of this issue will result in user dissatisfaction. This is the default priority.
      - i. Initial Response Time (by email or callback) is within two (2) business days during Normal Business Hours.
      - ii. Maximum Time Between Updates (by email or callback or implementation in System) is two (2) business days for the first week and as needed thereafter.
    - d. "Severity 4 issue" means an issue of minor significance. A slight variance exists between the product documentation and how the application actually performs.
      - i. Initial Response Time (by email or callback) is within two (2) business days during Normal Business Hours.
      - ii. Update is every five (5) business days, during the first month, and as needed thereafter.
      - iii. Solution is provided as part of a future release at Questionmark's discretion.
  4. Visibility of Questionmark Processes. Questionmark will provide regular updates of outstanding issues and share the visibility of the escalation process to Customer within the guidelines set by the communicated priority.
  5. Ability to schedule Technical Service Engineer's time to be available during critical server upgrades. Questionmark allows Dedicated Technical Support Representatives to be scheduled during Normal Business Hours at mutually convenient times to be available to Customer during high-risk periods (such as server upgrades).
  6. Dedicated Technical Support Representatives available for technical consulting. Dedicated Technical Support Representatives may be scheduled for chargeable consulting activities subject to quotation, agreement and a Statement of Work being accepted.

Available Consulting Services. The following services are not covered by this Software Support Agreement, but may be available from Questionmark for a fee; these, include but are not necessarily limited to:

1. Assistance with configuration of templates and workflows.

2. Assistance with non-Questionmark ("3rd Party") products is not covered by this Software Support Agreement. When troubleshooting issues with the interactions and integrations between Questionmark products and 3rd Party products, Questionmark will participate in conference calls with the Customer and the 3rd Party, when coordinated by Customer.
3. Strategic, business process, and change management consulting.
4. Product training (whether web based or face-to-face).
5. Assessment content development.
6. Application and software development (programming).
7. Systems architecture.
8. Travelling and/or on-site visits.
9. QMWise configuration and/or other API configuration.

Following a request for Consulting Services, Questionmark may produce a quotation or an SOW which shall be reviewed by Customer and once agreed in writing by Customer and Questionmark shall be the Order for such Consulting Services. Customer shall be solely responsible to confirm that the SOW satisfies the operational needs and requirements of its business and to identify any modifications to the SOW that it requires. The Consulting Services shall be performed and delivered at the places set out in the applicable SOW. Questionmark shall use commercially reasonable efforts to meet any timelines set in the applicable SOW, but time shall not be of the essence for performance and delivery unless otherwise expressly agreed in writing between the parties.

In the event that an applicable SOW requires Questionmark to develop software, upon the delivery of such newly developed software (each a "Deliverable"), Customer shall have ten (10) business days to review such Deliverable for any material non-conformance with the terms of the SOW. In the event that 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. In the event the Deliverable is not in material conformance with the terms of the SOW, Customer must notify Questionmark within the ten (10) day period and Questionmark will remedy such material non-conformance so as to bring it into material compliance with the SOW within a reasonable period. Unless specified otherwise on the SOW, the Deliverables will not be covered by any support plan.

Questionmark shall retain ownership of all title and rights to any Deliverables developed pursuant to Consulting Services, including certain rights, if any, that Questionmark has pursuant to a license from any third party. Additional license terms relating to the Deliverables will be set out in the Order.

**Communications Responsibility and Costs.** Customer will be responsible for all costs of any modem and/or network connections at Customer's site and the associated line-use charges. Any network access by Questionmark may be subject to Customer's approval and such access will be solely for the purpose of diagnosing problems and supporting Customer's use of the software.

**Travel and Hotel Expenses.** On-site visits are not normally required and not provided for under the Software Support Agreement. However, on-site consulting visits can be arranged for a fee. When Customer requests an on-site visit Customer will reimburse Questionmark for any out-of-

pocket expenses incurred at Customer's request, including travel to and from Customer's site, lodging, car rental, and meals.

**Proprietary Rights.** All proprietary rights in or to the software provided to Customer by Questionmark and all changes, additions, and/or enhancements to such software, shall remain the sole property of Questionmark.

**Termination.** In the event of termination of the Software Support Agreement, all maintenance fees or charges payable for the entire term of the Software Support Agreement shall without notice or demand by Questionmark immediately become due and payable, and Questionmark's obligations under the Software Support Agreement shall immediately end. In the event of termination other than by default, 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.

Questionmark may terminate this Software Support Agreement in the event of default by Customer. Default by the Customer includes, but is not limited to, Customer's failure to pay the maintenance fee within fifteen (15) days after notice that the same is thirty (30) days or more delinquent. Once terminated the Software Support Agreement can be re-instated by purchasing the upgrade for the latest version (if applicable) and paying the then applicable fee for the Software Support Agreement.

**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 licensors 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, including but not limited to employment termination or discharge, or discipline; employee compensation; and/or employment promotions or advances.

**CONFIDENTIAL INFORMATION.** The parties acknowledge and agree that during performance of the Services contemplated pursuant to the Software Support Agreement, the parties may disclose Confidential Information (as defined herein) to the other party. As a result, the parties agree to keep the Confidential Information strictly confidential and to only disclose the Confidential Information to their respective employees, affiliates, subcontractors and agents on

a “need to know” basis in connection with performance under the Software Support Agreement. For the purpose of the Software Support Agreement, Confidential Information shall include, but not be limited to the Perception Server software and the specifications and requirements of such, information of the disclosing party specifically marked or referenced as confidential, and any and all other information which relates to source codes or the internal methods of operation of the disclosing party, including but not limited to application program interfaces. Confidential Information shall also include visual information observed by the receiving party, while on the disclosing party’s premises or while accessing the network of the disclosing party, regardless of whether the disclosing party has specifically marked or referenced such Confidential Information as confidential.

LIMITED WARRANTY. Questionmark warrants that support engineers will make commercially reasonable efforts to solve any problem issues; however, Customer acknowledges and agrees that there can be no guarantee that support engineers will be able to solve each and every problem or issue.

NO OTHER WARRANTIES. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, OTHER THAN THE LIMITED WARRANTY SET FORTH IN THE PRIOR PARAGRAPH, ALL OTHER EXPRESS OR IMPLIED WARRANTIES ARE HEREBY EXCLUDED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY OR SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT OF INTELLECTUAL PROPERTY, WITH REGARD TO SOFTWARE SUPPORT SERVICES, CONSULTING SERVICES, DELIVERABLES AND MATERIALS OR SOFTWARE PROVIDED IN CONNECTION THEREWITH.

LIMITATION OF LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND SUBJECT TO THE LIABILITY RESTRICTION BELOW, IN NO EVENT SHALL QUESTIONMARK OR ITS SUPPLIERS BE LIABLE FOR (a) ANY SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER INCLUDING, WITHOUT LIMITATION, FOR ANY PECUNIARY LOSS, OR FOR (b) DAMAGES FOR LOSS OF BUSINESS PROFITS OR ANTICIPATED SAVINGS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, IN EACH CASE WHETHER DIRECT OR OTHERWISE, ARISING OUT OF THIS SOFTWARE SUPPORT AGREEMENT, INCLUDING THE USE, PROVISION OF, OR FAILURE TO PROVIDE SOFTWARE SUPPORT SERVICES, EVEN IF QUESTIONMARK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SUBJECT TO THE LIABILITY RESTRICTION BELOW QUESTIONMARK’S ENTIRE LIABILITY UNDER ANY PROVISION OF THIS SOFTWARE SUPPORT AGREEMENT SHALL BE LIMITED TO THE GREATER OF THE AMOUNT ACTUALLY PAID BY CUSTOMER FOR SOFTWARE, SOFTWARE SUPPORT OR US \$500.00 OR ITS EQUIVALENT IN ANOTHER CURRENCY.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL ANY QUESTIONMARK LICENSOR BE LIABLE TO CUSTOMER FOR ANY CLAIM UNDER THIS SOFTWARE SUPPORT AGREEMENT, INCLUDING THE USE, PROVISION OF, OR FAILURE TO PROVIDE SOFTWARE SUPPORT SERVICES, INCLUDING WITHOUT LIMITATION ANY DIRECT, 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 CUSTOMER'S USE OR INABILITY TO USE THE PERCEPTION SERVER SOFTWARE OR COMPONENT EVEN IF THE LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES .

LIABILITY RESTRICTION. NOTHING IN THIS SOFTWARE SUPPORT AGREEMENT SHALL EXCLUDE OR RESTRICT QUESTIONMARK'S LIABILITY FOR DEATH OR PERSONAL INJURY CAUSED BY ITS NEGLIGENCE OR THAT OF ITS EMPLOYEES OR AGENTS FOR WHICH IT IS RESPONSIBLE, OR FOR FRAUDULENT MISREPRESENTATION.

Purchase from a Questionmark Reseller. If Customer has purchased the Software Support and/or Consulting services from a Questionmark reseller:

1. Questionmark shall be obligated to provide Software Support and/or Consulting Services only in conformity with its agreement with that reseller, including with regard to the duration of support, regardless of whether the order or other documentation between Customer and such reseller provides different terms. Customer's sole recourse and remedy for any loss, damage, expense or other liability caused by such discrepancy shall be against such reseller.
2. The terms of this Software Support Agreement that contemplate payment directly from Customer to Questionmark are superseded by Customer's payment arrangement with such reseller and payment to Questionmark shall be made by such reseller. Notwithstanding the prior sentence, in the event that such reseller fails to make timely payment of fees to Questionmark, Questionmark shall be entitled to all remedies available herein with regard to the termination or suspension of this Software Support Agreement as if such payment had been due directly from Customer and, in the event that Customer have made payment to such reseller, Customer's sole recourse and remedy shall be against such reseller.
3. If the terms of any agreement or documentation between Customer and such reseller conflict with the terms of this Software Support Agreement, (i) Questionmark shall be entitled to perform and enforce this Software Support Agreement in accordance with its terms, (ii) as between Questionmark and Customer, the terms of this Software Support Agreement shall govern, and (iii) Customer's sole recourse and remedy for any loss, damage, expense or other liability caused by such conflict shall be against such reseller.

Assignment. Customer may assign the Software Support Agreement only in conjunction with a permitted assignment of the related license(s).

Severability. If any term of this Software Support 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 Software Support Agreement will remain in full force and effect.

General. The Software Support Agreement shall be binding when accepted by Questionmark at 260 Madison Ave, New York, NY 10016, USA and shall be governed by Connecticut law (Connecticut being a state in the United States), without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Software Support Agreement shall be subject to the exclusive

jurisdiction of the state and federal courts located in Bridgeport, Connecticut, USA.. Should Customer be domiciled in a country outside the United States, Questionmark shall have no liability to Customer resulting from the applicability and/or enforcement of the laws of that country related in any way to this Software Support Agreement. Customer hereby expressly waives any right granted by that country that may confer to Customer any rights different than those specifically contemplated and provided under this Software Support Agreement. Customer shall defend and indemnify Questionmark against any and all claims related to any claims or additional obligations imposed on Questionmark due to the application and/or enforcement of law in other jurisdictions. Customer acknowledges that the software and technical services supplied by Questionmark under the Software Support Agreement are subject to the Export Control Regulations of the United States and European Union. Customer agrees 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 the Software Support Agreement. The Software Support Agreement may be changed or modified only in writing signed by Questionmark.