

Tierra™ Subscription Agreement - Terms and Conditions

This Subscription Agreement (this “Agreement”) is between Topcon Positioning Systems, Inc. (“TPS”) and the subscriber identified on the Tierra™ Subscription Agreement order form (“You”) for Your access to TPS’ web-based Tierra™ service.

1. General Terms and Conditions of Subscription.

During the Term, TPS will provide You with the following: a) a subscription to TPS’ web-based Tierra™ service and b) wireless data communications service, (collectively the “Tierra Service”). You must separately purchase Tierra hardware from an authorized TPS Distributor. This Agreement is solely between You and TPS. You may not resell the Tierra Service, in whole or in part, to any other individual or entity. Your use of the Tierra Service, and anyone using the Tierra Service through You is subject to this Agreement and the Terms of Use posted at TPS’ Tierra Service web site. Those Terms of Use are incorporated herein by reference; in the event of a conflict, the Terms of Use shall prevail.

The use of the Tierra Service without a current, valid subscription is prohibited. Any on-site training or support requested by You may involve additional charges. All software items delivered to You hereunder are licensed and not sold. The provisions of any relevant license agreement included with the software shall also govern Your use of any software covered by this Agreement or used with the Tierra Service.

TPS reserves the right to access all data collected, transmitted and stored under the Tierra Service to track the use of and to make modifications and upgrades to the Tierra Service and for TPS’ own commercial purposes without Your prior written consent. Any such use by TPS of the data will be done on a “no-names” basis and TPS will not rebroadcast, sell, transfer, license or sublicense the data.

2. Term and Termination.

The initial term of this Agreement is for 3 years (the “Initial Term”). Unless either party provides written notice to the other of its intent not to have the Agreement renew, after the Initial Term, this Agreement shall automatically renew on a month-to-month basis (a “Renewal Term”). If You cancel the Tierra Service, in whole or in part, before the end of the Initial Term, You must pay all remaining monthly payments due until the end of the initial Term and are not entitled to any refund. During a Renewal Term, You or TPS may cancel the Tierra Service at any time by notifying the other party at least 1 month prior to the end of the current billing cycle and cancellation will be effective at the end of the next full billing cycle and You must pay all monthly fees through the end of such billing cycle. Charges for the Tierra Service are not refundable under any circumstances. Upon termination of Tierra Service for any reason, You will discontinue use of the Tierra Service and either return or certify as destroyed all copies of software, and related materials and documentation obtained through the Tierra Service.

Notwithstanding the foregoing, if You fail to pay any amounts due under this Agreement or are otherwise in breach of any provision hereof TPS may, in its sole discretion, (i) without notice, terminate or suspend the Tierra Service and this Agreement immediately and receive from You all amounts due under this Agreement plus all costs of collection and/or (ii) pursue any other remedy at law or in equity.

3. Payment.

Commencing upon Your initial use of the Tierra Service, You will be billed on a quarterly or annual basis (at Your option), at the then-current rate for the Tierra Service. An overage charge of \$8.00/MB will be billed for every MB exceeding each Plan’s maximum (as posted in the most current price book). Any time after the Initial Term, TPS may unilaterally change the price for Tierra Service by giving You at least 30 days prior notice. Unless stated otherwise, all prices are stated and shall be paid in United States Dollars. You will pay the amounts owed under the Agreement, including any and all roaming charges, applicable taxes or duties and also any charges that result directly or indirectly from government regulations or mandates. TPS will endeavor to give You reasonable prior written notice if any such costs and/or charges are implemented after Your Tierra Service starts. In addition to all other rights, if any portion of Your bill is not paid when due, TPS may charge You a late fee equal to 1½% per month or the maximum rate permitted by law on unpaid balances. If Tierra Service is suspended due to Your failure to timely pay TPS, You will be billed a fee of \$150.00 per hardware unit upon restoration of Tierra Service. TPS shall have the continuing right to approve Your credit and change Your credit terms.

4. Risk of Loss.

You are responsible for any damage to and risk of loss for the hardware related to the Tierra Service, from any cause, including vehicle failure, theft, fire, collision, tampering, and vandalism. Despite any such damage or loss, You shall not be excused from performance under this Agreement.

5. Interruption of Service; Force Majeure.

TPS will use reasonable commercial efforts to maintain the Tierra Service in working condition. You are aware that interruptions in service may occur from time to time for a variety of reasons, and therefore the availability of the Tierra Service or any data from the Tierra Service is not guaranteed.

TPS shall not be held liable by You or any third party for any loss or damage arising from the Tierra Service, or its delay or interruption, transmission errors, defects or any other causes, including, but not limited to, interruption caused by the underlying carrier. TPS does not assume and shall not have any liability for events beyond TPS' control or the control of TPS' subcontractors, or licensors, including, but not limited to, acts of God, acts of terrorism (foreign or domestic), acts of any governmental entity, acts of public enemy, acts of war, civil disturbances, court order, labor strikes or weather conditions. Periods of discontinuous Outage may not be accumulated in determining if an Outage has continued for at least forty-eight (48) hours. In order to receive such credit, Customer must submit a written request to TPS, stating the date and location of the Outrage, the account(s) affected, and such other information as TPS may reasonably require. Such notice must be received by TPS within ten (10) business days following the last date of the period of Outage. Except as provided herein, TPS shall incur no liability for Outages.

6. Misuse of Tierra Service.

You may not misuse or make fraudulent use of the Tierra Service. Such prohibited activities include, but are not limited to, (i) attempting or assisting another to access, alter, or interfere with the communications and/or information about another TPS customer, (ii) tampering with or making an unauthorized connection to the Tierra Service, (iii) installing any amplifiers, enhancers, repeaters, or other devices that modify the radio frequencies used to provide the Tierra Service, (iv) subscription fraud, (v) using the any components of the Tierra system in such a manner so as to interfere unreasonably with the use of Tierra Service by one or more other customers or to interfere unreasonably with the underlying carrier's ability to provide Tierra Service, (vi) using the Tierra Service to convey obscene, salacious, or unlawful information; (vii) Using the Tierra Service without permission on a stolen or lost device, (viii) unauthorized access, (ix) taking any action that imposes an unreasonable or disproportionately large load on the Tierra Service infrastructure, (x) using the Tierra Service in a manner that it is not in compliance with FCC rules. If You misuse or make fraudulent use of the Tierra Service, TPS may, without notice, take any action it deems reasonable, including interrupting, suspending or terminating Your Tierra Service and You will be responsible to TPS for any costs incurred (including attorney's fees) as a result.

7. No Warranties and Limitation of Liability.

Use of the Service and data provided by the Service is at Your sole risk. You accept the Service on an "AS-IS" and "AS AVAILABLE" basis. TPS makes no guarantees, representations or warranties (express or implied) concerning the data from the Tierra Service, including its accuracy or value. TPS makes no assurance of successful reception of the data. All warranties of merchantability or fitness for a particular purpose are hereby excluded. TPS shall not be responsible to You or any of your affiliates or any third party for lost revenues, lost profits, lost data, or other special, incidental, direct, indirect or consequential damages or loss or other expense directly or indirectly arising out of your use of or inability to use the Tierra Service or the data generated by the Tierra Service, even if TPS has been advised of such damages. You have not relied on and are NOT entitled to the benefits of any representations, promises, descriptions of services, or other statement not specifically set forth in this Agreement. The parties agree that this is a contract for Tierra Service, not a contract for goods and that, accordingly, the Uniform Commercial Code (or any similar statutory scheme) does not apply. TPS shall bear no liability for problems caused by modifications made by You (whether TPS is on notice of such modifications or not), problems with Your computer hardware, operating systems, or operating characteristics, or for problems in the interaction of the hardware or software with non-TPS software components.

TPS' entire liability and Your exclusive remedy for breach of this Agreement shall be refund of the Tierra Service fees paid for the 2 month period preceding the date the claim arose, regardless of any defect in the service, software, communications networks, or negligence on the part of TPS or its subcontractors or agents and regardless of the claim or form of action. You assume all risk of use of the Tierra Service, including but not limited to, traffic accidents while using the service. The Tierra Service is not guaranteed against third party access, including eavesdroppers or interceptors. TPS shall not be liable to You or any third party for lack of privacy or security.

You and Your affiliates shall hold harmless and defend TPS from and against any loss, liability, damage, expense (including attorney's fees) or claims of third parties resulting from any use or misuse of the Tierra Service by You or any third party using the Tierra Service through You and from Your breach of any of the terms of this Agreement.

8. Export.

You shall not export, directly or indirectly, any item covered by this Agreement to any country in violation of any law or regulation, including without limitation any law or regulation of the U.S. Government or any agency. You are solely responsible for complying with all applicable export and import regulations and obtaining all necessary export and import licenses or permits for the direct or indirect export of import of any item covered by this Agreement.

9. Carrier Required Disclosures.

A. You have no contractual relationship with the underlying wireless service carrier and you are not a third party beneficiary of any agreement between TPS and the underlying carrier. You understand and agree that the underlying carrier shall have no legal, equitable, or other liability of any kind to you. In any event, regardless of the form of the action, whether for breach of contract, warranty, negligence, strict liability in tort or otherwise, your exclusive remedy for claims arising in any way in connection with this agreement, for any cause whatsoever, including but not limited to any failure or disruption of Tierra Service provided hereunder, is

limited to payment of damages in an amount not to exceed the amount paid by customer for the Tierra Service during the 2 month period preceding the date the claim arose.

B. You shall indemnify and hold harmless the underlying wireless service carrier and its officers, employees, and agents against any and all claims, including, without limitation, claims for libel, slander, or any property damage, personal injury or death, arising in any way, directly or indirectly, in connection with this agreement or the use, failure to use, or inability to use the Tierra Service except where the claims result from the underlying carrier's gross negligence or willful misconduct. This indemnity shall survive the termination of the agreement.

C. You have no proprietary right in any number assigned to you and understand that any such number can be changed from time to time.

D. You understand and agree that TPS and the underlying carrier cannot guarantee the security of wireless transmissions, and will not be liable for any lack of security relating to the use of the Tierra Service.

10. Entire Agreement.

This Agreement along with the Terms of Use and any relevant license agreement(s), constitute the entire agreement between You and TPS, and supersedes any and all prior agreements, negotiations and communications (whether written, oral or electronic) with respect to the Tierra Service. No change, modification, or waiver of the terms and conditions of this Agreement, shall be binding on TPS unless made in writing by TPS. However, You acknowledge that applicable FCC rules and regulations are subject to change and that TPS may freely and without liability to You, modify this Agreement to comply with such FCC rules.

11. Miscellaneous.

You may not transfer or assign any of its rights or obligations under this Agreement in whole or in part without the prior written consent of TPS. This Agreement is severable and if any non-material provision is held to be invalid or unenforceable, the remaining provisions remain binding. The failure of either party to exercise any right herein shall not be deemed a waiver to exercise such right (or any other right) in the future. Each remedy is distinct and cumulative to all other rights or remedies, and may be exercised concurrently, independently, or successively, in any order. You are an independent contractor with entire control and operation of Your business subject to the terms hereof. No agency, employment, franchise, partnership or other special relationship is created or implied by the terms of this Agreement. All pricing information, trade secrets or proprietary information of TPS which is disclosed to You under this Agreement shall be kept confidential by You and shall not be disclosed to third party, specifically without limiting the foregoing, any of TPS' competitors.

This Agreement, its performance, and all rights and obligations of the parties, are governed by California law (excluding conflicts of laws). Any dispute arising under, out of, or in any way related to this Agreement shall be exclusively resolved by binding arbitration after written demand from one party to the other pursuant to the rules and regulations of the American Arbitration Association governing commercial transactions. The arbitration proceeding shall be conducted in San Francisco, California within 90 days of any demand for arbitration. Each party will pay one-half of the costs of the arbitration. Any arbitration decision or award shall be final and not subject to appeal. Neither party shall commence litigation against one another with respect to any dispute subject to arbitration hereunder, except as necessary to enforce this provision or an arbitrator's decision.

You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service must be filed within one (1) year after such claim or cause of action arose or be forever barred.

Any notice hereunder shall be in writing, shall be sent by certified mail or reputable overnight courier and shall be deemed to have been received and be effective on the day delivered to You at Your main business address or to TPS at both of the following addresses:

Topcon Positioning Systems, Inc.
7400 National Drive
Livermore, California 94550
Attn.: Mark S. Bittner, Sr. Vice President

Topcon Positioning Systems, Inc.
37 West Century Road
Paramus, N.J. 07652
Attn.: Randy Samuels, General Counsel

END – Tierra™ Web-based Subscription Agreement - Terms and Conditions