

Cynthia Friauf

From: Cynthia Friauf
Sent: Monday, March 10, 2014 6:33 PM
To: Felicia Tucker
Subject: LP Software contract
Attachments: Croweagreement.pdf

Hello,

I have the comments to the agreement. There are comments on the pdf document and below. You will need to look at both for all of the comments. I assume you will have your legal department look at these and get back to me. We can schedule a time to talk about any questions or comments they may have.

Thank you for your patience in this.

Regards,
Cynthia

comments to Attachment 2 – Crowe Tax Risk Assessment & Control Solution License Agreement.

✓ 4(a) add the following representations and warranties:

Crowe further represents and warrants: (i) its performance under this Agreement and the Licensed Works shall at all times comply with all federal, state and local laws and regulations; (ii) it will perform all services in a professional and competent manner using properly qualified and trained employees; (iii) there is no pending or threatened litigation that would have a material adverse impact on its performance under this Agreement; (iv) during the term of this Agreement, the Licensed Works shall materially conform to the requirements of this Agreement and the applicable specifications and documentation published by Crowe describing the functionality of the Licensed Works; and (v) Crowe shall use commercially reasonable efforts to ensure the Licensed Works provided hereunder is free from viruses, spyware, and other similar harmful and destructive code.

5(a) ^{changed-} add the following to the beginning of this Section: "EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH ~~HEREIN,...~~" *in Paragraph 4 above*

Both 5(a) and 5(b) have broad disclaimers of warranties with respect to third-party software. If Bradley will be obtaining third-party software from Crowe, it should obtain the applicable license and contract documentation to confirm the terms are acceptable.

12 The confidentiality provisions only applied to protect confidential information of Crowe. Crowe should be obligated to protect the confidentiality of Bradley information in this section or a separate agreement.

14 add the following to the end of this Section (and on page 2 in the Fees Section),

"Licensee shall have the right to withhold amounts it disputes in good faith as being owed to Crowe. Pending settlement or resolution of the dispute, Licensee's non-payment of such disputed items shall not constitute default by Licensee, and shall not entitle Crowe to suspend or delay its provision of Services or other compliance with this Agreement."

15 ✓ add the following to the end of this section,

“Notwithstanding the generality of the foregoing, Crowe shall: (i) promptly correct any failure of the Licensed Works to perform in accordance with the requirements of this Agreement, including without limitation, defect repair, programming corrections, and remedial programming, and provide such services and repairs required to maintain the Licensed Works so that they operate properly and in accordance with the requirements of this Agreement; (ii) provide telephone support to Licensee and its users relating to use and operation of the Licensed Works and error resolution during Licensee’s normal business hours; and (iii) provide Licensee with all new versions, releases, updates, enhancements of the Licensed Works at no additional charge.

17 add the following to the end of this Section:

“The limitations of liability in this Section and in Attachment 1 (Limit of Liability) shall not apply to limit Crowe’s indemnification obligations under Section 19, or Crowe’s liability for breach of its confidentiality obligations under this Agreement, including Attachment 1, or separate confidentiality agreement between the parties.”

In the first sentence change “fees paid during the six-month period” to “fees paid during the 12 month period ...”

21 add the following to the end of this Section:

“In the event of expiration or termination of this Agreement for any reason, Crowe shall fully cooperate with Licensee to facilitate and complete the prompt and orderly transition to another licensor of replacement or substitute software and/or provider to provide replacement or substitute services, as applicable. The transition assistance will include, without limitation, a continuation of the license rights hereunder and applicable Services, including access to remotely hosted software or Services, knowledge transfer (including applicable documentation) from Crowe to Licensee and the replacement provider, and the delivery of Licensee data to Licensee and/or the replacement provider. The transition assistance shall continue until such time the transition has been successfully completed and concluded. The transition assistance will be deemed by the parties to be governed by the terms and conditions of Agreements, except for those terms or conditions that do not reasonably apply to such transition assistance. In the event the termination results from a breach of this Agreement by Licensee, Crowe shall be paid at the rates set forth in this Agreement or as otherwise mutually agreed to by the parties. Otherwise, such services shall be provided by Crowe at no additional cost to Licensee. Licensee may seek specific performance of Crowe’s obligations under this section, and Crowe hereby waives any defense that damages are an adequate remedy. Compliance with this Section by either party shall not constitute a waiver or estoppel with regard to any rights or remedies available to the parties.”

30 add the following to the end of this Section:

“No shrink-wrap, click-wrap, click-through, click-accept, online terms or website terms shall modify any of the terms and conditions of this Agreement.”

Internet Explorer 7.0 or higher;
Firefox 3.0 or higher; and
Adobe PDF viewer.

4. CROWE'S RESPONSIBILITIES.

a. Crowe represents that the title to the Licensed Works shall be good; its transfer rightful; and Licensed Works shall be free and clear of any security interest, lien, or other encumbrance. Crowe hereby represents and warrants that it has all requisite power and authority to enter into and fully perform its obligations under this License; the execution, delivery and performance of this License and the consummation of the transactions contemplated hereby have been duly and properly authorized by all requisite action on the part of Crowe; and is an enforceable obligation of Crowe. ~~Crowe further represents and warrants: (i) its performance under this Agreement and the Licensed Works shall at all times comply with all federal, state and local laws and regulations; (ii) it will perform all services in a professional and competent manner using properly qualified and trained employees; (iii) there is no pending or threatened litigation that would have a material adverse impact on its performance under this Agreement; (iv) during the term of this Agreement, the Licensed Works shall materially conform to the requirements of this Agreement and the applicable specifications and documentation published by Crowe describing the functionality of the Licensed Works; and (v) Crowe shall use commercially reasonable efforts to ensure the Licensed Works provided hereunder is free from viruses, spyware, and other similar harmful and destructive code.~~

5. DISCLAIMER OF WARRANTIES

ALL RIGHTS NOT EXPRESSLY GRANTED TO LICENSEE SHALL REMAIN AT ALL TIMES WITH CROWE.

a. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH HEREIN IN PARAGRAPH 4 ABOVE, THE LICENSED WORKS ARE PROVIDED "AS IS," "WITH ALL FAULTS," AND "AS AVAILABLE" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, OR STATUTORY. CROWE EXPRESSLY DISCLAIMS ALL OTHER EXPRESS, IMPLIED, OR STATUTORY WARRANTIES, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COMPLETENESS, CURRENTNESS, ACCURACY, NON-INFRINGEMENT OR THOSE ARISING BY STATUTE OR OTHERWISE IN LAW FROM A COURSE OF DEALING OR USE OR TRADE. LICENSEE ASSUMES FULL RESPONSIBILITY FOR THE SELECTION OF THE LICENSED WORKS TO ACHIEVE INTENDED RESULTS AND FOR THE CONFIGURATION USE AND RESULTS OBTAINED FROM THE LICENSED WORKS. SPECIFICALLY, CROWE IS NOT RESPONSIBLE FOR FEES TO DEFEND ANY TAX AUDITS, PENALTIES, INTEREST OR ANY OTHER COSTS ASSOCIATED FROM USE OF THE LICENSED WORKS. CROWE DOES NOT WARRANT THE PERFORMANCE OF THE LICENSED WORKS OR RESULTS LICENSEE MAY OBTAIN BY USING THE LICENSED WORKS, SUCH FILES, OR THE RESULTING DOCUMENTATION OR FORMS. CROWE DOES NOT WARRANT THAT THE FUNCTIONS CONTAINED IN THE LICENSED WORKS WILL MEET LICENSEE'S

Comment [JF1]: LHB: Both 5(a) and 5(b) have broad disclaimers of warranties with respect to third-party software. If Bradley will be obtaining third-party software from Crowe, it should obtain the applicable license and contract documentation to confirm the terms are acceptable.
OK.

License does not constitute a sale of the Licensed Works or any portion or copy of it. Licensee acknowledges and agrees that this License in no way will be construed to provide Licensee an implied license to the proprietary information of Crowe contained within the Licensed Works(s). Notwithstanding the foregoing, the Parties agree that any data stored within or through Licensee's use of the Licensed Works, including any data structures or relationships, is Licensee's Confidential Information (as defined in the Confidentiality section herein), and is and will remain the sole and exclusive property of Licensee.

9. NO TRADEMARK RIGHTS.

No license, right or interest in any Crowe's (or Crowe's licensors', if any,) trademark, trade name, or service mark is granted. Any rights not explicitly granted to Licensee are expressly reserved by and to Crowe.

10. USE BY THIRD PARTIES.

Licensee may allow one or more third parties on a need to know basis ("Authorized Third Party") to use the Licensed Works but only for Licensee's internal business operations and activities, provided that Licensee will be liable for any and all acts or omissions committed by such Authorized Third Parties, subject to the other restrictions of this License.

11. RESPONSIBILITY FOR HARDWARE.

Licensee is responsible for providing appropriate hardware and supporting operating system on which to run the Licensed Works. Crowe makes no representation or warranty that the Licensed Works will be interoperable with, or appropriately function with, any hardware, operating system, or other software that is possessed or used by Licensee.

12. NON-DISCLOSURE OF CONFIDENTIAL INFORMATION.

a. The terms and conditions of this License, along with any information relating to or regarding the Licensed Works ("Confidential Information") are confidential and will not be disclosed, orally, in writing, or otherwise by Licensee to any third party without Crowe's prior written consent. Crowe represents and Licensee acknowledges that the Licensed Works contain valuable proprietary information and trade secrets, are confidential, and Licensee will protect the Licensed Works as Confidential Information with at least the same degree of care and confidentiality, but not less than a reasonable standard of care, which Licensee uses for its information that it considers confidential and/or a trade secret. The concept of a "reasonable standard of care" will include compliance by the Licensee with all laws applicable to the disclosure and use of such Confidential Information. Notwithstanding the foregoing, Licensee may disclose Confidential Information to its respective Users where: (i) such disclosure is reasonably necessary to perform duties hereunder; (ii) such Users agree in writing to observe the confidentiality and restricted use and disclosure covenants and standards of care set forth herein; and (iii) Licensee assumes responsibility for the acts or omissions of the persons and entities to which it makes disclosures of the Confidential Information no less than if the acts or omissions were those of Licensee. However, Licensee will not have any obligation of confidentiality with regard to information which (i) is or becomes a part of the public domain

Comment [JF2]: LHB: The confidentiality provisions only applied to protect confidential information of Crowe. Crowe should be obligated to protect the confidentiality of Bradley information in this section or a separate agreement.

Confidentiality is already covered in the Engagement Letter. This provision is particular only to the License Agreement.

through no act or omission of Licensee, (ii) was in Licensee's lawful possession prior to the disclosure thereto and had not been obtained by Licensee either directly or indirectly from Crowe, (iii) is lawfully disclosed to Licensee by a third party without restriction on disclosure, (iv) is independently developed by such Licensee (but is not reverse engineered), (v) is required to be disclosed by law, or (vi) a graphical user interface or other screen display that appears on monitors and provides user/operator interfaces. The burden of proof that Confidential Information falls into any one of the above exemptions will be borne by the Party claiming such exemptions.

b. Licensee may disclose the Confidential Information to the extent required by law, regulation, discovery process, order of a court, governmental agency, or national stock exchange rule. However, Licensee must give Crowe prompt notice (to the extent such notice is not prohibited by law or applicable order) to permit Crowe an opportunity to obtain a protective order or otherwise protect the confidentiality of such information, all at the Crowe's cost and expense.

c. Licensee will promptly notify Crowe, in writing, in the event of any known or suspected disclosure, loss, or use in violation of this License of Crowe's Confidential Information.

d. The covenants of confidentiality set forth herein shall apply after the Effective Date of this License to any Confidential Information disclosed to Licensee before, on, or after the Effective Date and will continue and must be maintained from and after the Effective Date until such Confidential Information enters the public domain through no fault of Licensee.

e. Licensee agrees that if Licensee breaches any of its obligations of confidentiality, Crowe will be irreparably harmed and in addition to all other remedies, Crowe is entitled to relief in equity, including a temporary or permanent injunction, without the necessity of proof of actual damage or bond.

13. INDEPENDENT CONTRACTOR RELATIONSHIP.

The parties are and shall be independent contractors to one another, and nothing herein shall be deemed to cause this License to create an agency, partnership, or joint venture between the parties. Nothing in this License shall be interpreted or construed as creating or establishing the relationship of employer and employee between Licensee and either Crowe or any employee or agent of Crowe.

14. FEES.

Crowe will grant access to Licensed Works for each year's returns. Access to Licensed Works is intended only for the User to prepare the current year's Forms 990 filings only. Preparation of future years' returns will require additional payment and acceptance of a new License. ~~Licensee shall have the right to withhold amounts it disputes in good faith as being owed to Crowe. Pending settlement or resolution of the dispute, Licensee's non-payment of such disputed items shall not constitute default by Licensee, and shall not entitle Crowe to suspend or delay its provision of Services or other compliance with this Agreement.~~

Comment [JF3]: This is not appropriate. License Fees are due and payable in advance.

15. MAINTENANCE AND SUPPORT.

Crowe will provide on-going IT technical support for account access only. Tax advice or assistance is not included as part of this license agreement. Crowe will use commercially reasonable efforts to respond to requests from Licensee for Licensed Works maintenance and IT support in a manner and time frame which are reasonably responsive considering the nature and severity of the request. If a malfunction corrected by Crowe was due to Licensee's negligence, Licensee agrees to pay Crowe the fair market value of the services Crowe provided in making the change or correction. Notwithstanding the generality of the foregoing, Crowe shall: (i) promptly correct any failure of the Licensed Works to perform in accordance with the requirements of this Agreement, including without limitation, defect repair, programming corrections, and remedial programming, and provide such services and repairs required to maintain the Licensed Works so that they operate properly and in accordance with the requirements of this Agreement; (ii) provide telephone support to Licensee and its users relating to use and operation of the Licensed Works and error resolution during Licensee's normal business hours; and (iii) provide Licensee with all new versions, releases, updates, enhancements of the Licensed Works within the then current License year at no additional charge.

16. NON-SOLICITATION OF EMPLOYEES.

For the duration of this License and for the period of one (1) year following termination hereof, neither party shall, directly or indirectly, recruit or attempt to recruit any employee or agent of the other party or otherwise initiate any offer or promise of employment with any employee or agent of the other party without the prior written consent of the other party. If permission is granted by the other party to the party requesting permission and an employee or agent of the other party is employed by the party requesting permission any time prior to the termination of this License or the one (1) year period thereafter, then the party requesting permission shall pay a fee to the other party in the amount of one (1) times the annual salary of such employee or agent for the year in which such employee or agent is employed by the party requesting permission.

17. LIMITATION OF LIABILITY.

CROWE'S TOTAL AGGREGATE LIABILITY HEREUNDER SHALL NOT EXCEED THE AMOUNTS RECEIVED BY CROWE UNDER THIS LICENSE DURING THE ~~SIX-MONTH~~ ^{twelve month} PERIOD PRECEDING THE ACCRUAL OF ANY LIABILITY OF CROWE TO LICENSEE AND WRITTEN NOTICE FROM LICENSEE TO CROWE REGARDING THE SAME. THESE ARE LICENSEE'S EXCLUSIVE REMEDIES AGAINST CROWE WITH RESPECT TO THE LICENSE AND THE LICENSED WORKS. LICENSEE UNDERSTANDS THAT LICENSEE IS SOLELY RESPONSIBLE FOR ANY DAMAGE TO LICENSEE'S COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM USE OF THE LICENSED WORKS. BECAUSE SOFTWARE IS INHERENTLY COMPLEX AND MAY CONTAIN ERRORS, LICENSEE IS ADVISED TO VERIFY AND BACKUP ITS WORK. CROWE IS EXPRESSLY NOT LIABLE FOR LICENSEE'S DATA INTEGRITY OR FOR ANY LOSS OF OR DAMAGES THAT MAY OCCUR TO LICENSEE'S DATA, BUSINESS, OR BUSINESS RELATIONSHIPS DUE TO MALFUNCTIONING, UNAVAILABLE OR FAILURE OF THIRD PARTY SOFTWARE OR HARDWARE PROVIDED HEREUNDER OR INCORPORATED IN THE LICENSED WORKS TO FULFILL ANY OF LICENSEE'S REQUIREMENTS, INCLUDING THE TRANSMISSION OR FILING OF A FORM 990 PROVIDED SUCH UNAVAILABILITY OR

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18. NO PUNITIVE OR CONSEQUENTIAL DAMAGES.

NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, COMPENSATORY, INCIDENTAL, EXEMPLARY OR PUNITIVE DAMAGES. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY LOST PROFITS, LOSS OF DATA LOST SAVINGS OR LOST BUSINESS OPPORTUNITY. THIS LIMITATION OF LIABILITY IS INTENDED TO APPLY TO THE FULLEST EXTENT ALLOWED BY LAW, REGARDLESS OF THE GROUNDS FOR OR NATURE OF ANY CLAIM ASSERTED (INCLUDING NEGLIGENCE) ARISING OUT OF LICENSEE'S USE OF THE LICENSED WORKS OR THE MARKETING, FURNISHING MAINTENANCE OR SUPPORTING OF THE LICENSED WORKS BY CROWE. THIS LIMITATION OF LIABILITY SHALL ALSO APPLY AFTER TERMINATION OF THIS LICENSE.

19. INDEMNIFICATION.

a. Crowe shall defend, indemnify and hold harmless Licensee from and against any claim of a third person for Crowe's knowing infringement of patents, copyrights, trade secrets or trademarks by Licensed Works: provided, however, that the foregoing undertaking of Crowe shall not apply unless Crowe has been informed as soon as reasonably practicable by Licensee of the charge or suit alleging such infringement and shall have been given the opportunity to take

the Licensed Works, upon termination of this License, Licensee will destroy Confidential Information in its possession or control. This License does not create any expectation of a continuing engagement between Crowe and Licensee. In the event of expiration or termination of this Agreement for any reason cause by Licensee only, Crowe shall fully reasonably cooperate with Licensee at Licensee's cost to facilitate and complete the prompt and orderly transition to another licensor of replacement or substitute software and/or provider to provide replacement or substitute services, as applicable. The transition assistance will may consist of include, without limitation, a continuation of the license rights hereunder and applicable Services for a period of up to days, including access to remotely hosted software or Services, knowledge transfer (including applicable documentation) from Crowe to Licensee (and the replacement provider if such is done under conditions (including but not limited to confidentiality) satisfactory to Crowe in its sole discretion), and the delivery of Licensee data to Licensee and/or the replacement provider. The transition assistance shall continue until such time the transition has been successfully completed and concluded. The transition assistance will be deemed by the parties to be governed by the terms and conditions of Agreements, except for those terms or conditions that do not reasonably apply to such transition assistance. In the event the termination results from a breach of this Agreement by Licensee, Crowe shall be paid at the rates set forth in this Agreement or as otherwise mutually agreed to by the parties. Otherwise, such services shall be provided by Crowe at no additional cost to Licensee. Licensee may seek specific performance of Crowe's obligations under this section, and Crowe hereby waives any defense that damages are an adequate remedy. Compliance with this Section by either party shall not constitute a waiver or estoppel with regard to any rights or remedies available to the parties have no obligation whatsoever to provide any transition assistance.

22. SURVIVAL.

Any terms of this License, such as, but not limited to, the sections on OWNERSHIP, CONFIDENTIALITY, and LIMITATION OF LIABILITY which by their nature extend beyond its termination remain in effect until fulfilled, and apply to respective successors and assignees. No shrink-wrap, click-wrap, click-through, click-accept, online terms or website terms shall modify any of the terms and conditions of this Agreement.

23. CHOICE OF LAW.

This License shall be construed in accordance with and governed by the laws of the State of Illinois without regard to choice of law rules. However, the parties specifically exclude application of the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Computer Information Transaction Act from this License and any transaction between them related thereto.

24. CONSENT TO JURISDICTION AND FORUM SELECTION.

The parties agree that all actions or proceedings arising from or relating to this License shall be tried and litigated exclusively in the state and federal courts located in Cook County, Illinois, and each party hereby consents to personal jurisdiction in such courts. This choice of venue is intended to be mandatory and is not permissive in nature. Each party waives any right it may have to assert the