

# ConEst®

## Software Systems

### End User License Agreement

**CONEST CORPORATION, DOING BUSINESS AS CONEST® SOFTWARE SYSTEMS ("LICENSOR"), WILL LICENSE SOFTWARE PRODUCTS TO YOU ONLY IF YOU ACCEPT THIS END USER LICENSE AGREEMENT ("AGREEMENT"). PLEASE CAREFULLY READ THIS AGREEMENT BEFORE USING THE PRODUCTS.**

By clicking the "I Accept" button when you placed an order for the Software (as defined below), or by installing or using the Software, you have indicated that you have read and understand this Agreement and accept all of its terms. If you do not accept all the terms of this Agreement, do not click "I Accept," do not install the Software and do not use the Software.

#### **Definitions**

"Documentation" means any installation guides, reference guides, operation manuals and release notes provided with the Software, whether made available in printed, electronic, or online form.

"Maintenance" means technical support services for the Software that Licensor makes available in accordance with Licensor's then-current Software Maintenance and Support Agreement.

"Software" means and includes each of the following products for which you have purchased a license from Licensor: SureCount, IntelliBid Estimating; IntelliBid Design Build; ConEst Electrical Formulas; JobTrac; and RapidDispatch.

"You," "your" and "yours" mean, refer to, and include the person or entity who has purchased a license for Software from Licensor and to any agent, employee, contractor, consultant, related person or entity, and affiliated person or entity, to whom such purchaser might provide access to such Software.

"Updates" means maintenance releases, enhancements, corrections, bug fixes, and modifications made to the Software that are provided to Licensor customers generally as part of and pursuant to a valid Software Maintenance and Support Agreement.

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- iii. modify, develop, port, translate, localize, reverse engineer, de-compile, disassemble, or create derivative works based on the Software, except to the extent expressly permitted by applicable law and solely to extent the parties shall not be permitted by that applicable law to exclude or limit such rights.

**3. License Term.** The license is effective until terminated. Licensor may terminate this Agreement upon written notice to you in the event you breach any material term of this Agreement or of any other agreement between Licensor and you, including without limitation any maintenance or support agreement. You agree that upon such termination you will either return the Software, Documentation, and Copies or, with Licensor's prior consent, destroy the Software, Documentation, and Copies. You may terminate the license at any time by deleting and destroying the Software, Documentation, and any and all copies, and providing written certification to Licensor that all of the foregoing have been destroyed.

**4. Confidentiality.** The Software contains valuable intellectual property and trade secrets of Licensor and constitutes confidential information of Licensor. You agree to protect the confidentiality of the Product with the same degree of care by which you protect your own such confidential information, but no less than reasonable care. Accordingly, you will not provide access to or disclose the Product or Copy to any third party without the prior written consent of a duly authorized U.S. Licensor corporate officer. In addition, you may not disclose or otherwise publish the results of any benchmark tests run on the Products to any third party without Licensor's prior written approval.

**5. Limited Warranties.** Licensor warrants that the media on which the Software is recorded will be free from defects in materials and workmanship under normal use and service for a period of 90 days from the original date of shipment of the Software ("Media Warranty Period"). Licensor warrants that the Software for a period of 90 days ("Software Warranty Period") from its original date of shipment or when first made available to you for download, will substantially conform to the Documentation.

If, during (a) the Media Warranty Period, a defect in the media occurs and is reported to Licensor, the media may be returned to Licensor, and Licensor will replace the media without charge to you, or (b) the Software Warranty Period a failure of the Software to conform as warranted occurs and is reported to Licensor, Licensor, at its option, will use commercially reasonable efforts to repair or replace the non-conforming Software.

The foregoing warranties will apply provided you give Licensor prompt written notice of the material defect or nonconformity within the warranty period specified above and return the defective media or non-conforming Software to Licensor in accordance with Licensor's return process.

**6. Warranty Limit.** The warranties set forth in **Section 5** do not apply to any failure of the Software caused by (a) your failure to follow Licensor's installation, operation, or maintenance instructions, procedures, or Documentation; (b) your mishandling, misuse, negligence, or improper installation, de-installation, storage, servicing, or operation of the Software; (c) unauthorized modifications or repairs; (d) use of the Software in combination with equipment or software not supplied by Licensor or authorized in the Documentation; and (e) power failures or surges, fire, flood, accident, actions of third parties, or other events outside Licensor's reasonable control.

Without limiting the foregoing, you have been advised by Licensor that the Software requires a SQL application. It is your responsibility to insure that an appropriate SQL application is installed in your host processor(s) and that any modifications to the SQL application necessary for the Software to operate properly are made.

Licensor cannot and does not warrant the performance or business results that may be obtained by using the Software, nor does Licensor warrant that the Software is appropriate for your intended purposes or that it will be error-free.

THE WARRANTIES SET FORTH IN **SECTION 5**, AS FURTHER LIMITED BY THIS **SECTION 6** AND BY **SECTION 7**, BELOW, ARE YOUR SOLE AND EXCLUSIVE REMEDY AND LICENSOR'S ENTIRE LIABILITY FOR DEFECTIVE MEDIA OR NON-CONFORMING SOFTWARE AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

**7. Liability Limits.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, EXCEPT IN THE EVENT OF YOUR (A) INFRINGEMENT OF LICENSOR'S INTELLECTUAL PROPERTY RIGHTS, OR (B) BREACH OF CONFIDENTIALITY, IN NO EVENT WILL EITHER PARTY BE LIABLE FOR SPECIAL, INDIRECT, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE, LOSS OF DATA, BUSINESS INTERRUPTION, OR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, EVEN IF ADVISED OF THE POSSIBILITY THEREOF.

TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT WILL THE CUMULATIVE LIABILITY OF LICENSOR EXCEED THE AMOUNTS PAID TO LICENSOR FOR THE APPLICABLE PRODUCT, MAINTENANCE, OR OTHER SERVICE THAT GAVE RISE TO SUCH CLAIM.

THE FOREGOING LIMITS WILL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN. THE LIMITATIONS OF LIABILITY SET FORTH IN THIS AGREEMENT ARE CUMULATIVE AND ARE INTENDED AND YOU ACKNOWLEDGE THAT THEY ARE INTENDED TO BENEFIT LICENSOR AND ITS THIRD PARTY SUPPLIERS, IF ANY.

Licensor is acting on behalf of its suppliers for the purpose of disclaiming, excluding and/or limiting warranties obligations, and liability as provided in Sections 5, 6 and 7 of this Agreement.

**8. Audit Rights.** Licensor may conduct, during normal business hours, an audit of your applicable records and computers to verify the number of copies of the Software in use and the host processors on which such copies are installed.

**9. Compliance With Export Controls and Other Laws.** You agree to comply, at your own expense, with all laws, regulations, rules, and ordinances of any governmental body, department, or agency that apply to or result from your obligations under this Agreement. Without limiting the foregoing, you acknowledge and agree that neither the Software, nor any related technical information, data, documents, or materials, nor the direct product thereof, will be exported, re-exported, diverted, transferred, or disclosed, directly or indirectly, to any country or to any national or resident thereof, except as authorized and permitted by the laws and regulations of the United States of America, including without limitation U.S. Export Administration Regulations. You will cooperate fully with Licensor in executing documents or licenses necessary to comply with these laws and regulations and with any related audit or inspection. You are responsible for complying with the import, export, and use restrictions of other applicable countries, including those that relate to Software which contains, uses, or performs encryption. You shall indemnify and hold Licensor harmless for all claims, demands, damages, costs, fines, penalties, attorney's fees, and all other expenses arising from your failure to comply with this Section 9.

**10. Survival.** Sections 2, 4-16 and your indemnification obligations will survive termination of this Agreement.

**11. No Assignment Without Licensor's Written Consent.** You will not directly or indirectly sell, transfer, assign, or delegate in whole or in part this Agreement, or any rights, duties, obligations or liabilities under this Agreement, to any third party, including to any affiliated entity, without the prior written consent of Licensor, which may be withheld for any reason.

**12. U.S. Government Restricted Rights.** All Software, Documentation and technical data which is sold or delivered pursuant to this Agreement for Government use are "commercial" as defined in Federal Acquisition Regulation ("FAR") 2.101 and any supplement thereto, and are provided with RESTRICTED RIGHTS. All Software was fully developed at private expense. Use, duplication, release, modification, transfer, or disclosure (for purposes of this section, "Use") of the Software is restricted by the terms of this Agreement and further restricted in accordance with FAR 52.227-14 for civilian Government agency purposes and 252.227-7015 of the Defense Federal Acquisition Regulations Supplement ("DFARS") for military Government agency purposes, or the similar acquisition regulations of other applicable Government organizations, as applicable and amended. The Use of the Product is restricted by the terms of this Agreement, in accordance with DFARS Section 227.7202 and FAR Section 12.212. All other Use is prohibited except as described herein.

**13. Additional Terms and Limitations for Unsupported Products.**

**(a) Evaluation Products.** Prior to you making a decision to purchase Products, Licensor may distribute versions of its Software to you for testing, evaluation, or demonstration purposes ("Evaluation Software"). Subject to the terms of this Agreement, if Licensor provides you with Evaluation Software, then Licensor grants you a temporary, revocable, non-exclusive, non-transferable license to use the Evaluation Software set forth in the applicable Licensor Evaluation Request Form and the Documentation solely for testing, evaluation, or demonstration purposes ("Purpose"). Evaluation Software contains a license key that disables the Software after \_\_\_ days, or such other term as may be agreed to by the parties, and which will render the Evaluation Software unusable. If, after using the Evaluation Software, you wish to continue such use, you must purchase the Software.

**(b) Pre-Released Product.** From time to time, Licensor may agree to provide software which is not yet commercially available for Beta testing hereinafter ("Pre-Released Software"). If you receive Pre-Released Software, then it will be subject to the general terms of this Agreement as well as the specific terms of this Subsection 13(b) and the

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**(c) Unsupported Products.** If the Software you have received is or includes Evaluation Software or Pre-Released Software (collectively "Unsupported Products"), then you acknowledge and agree that you will take all precautions and safeguards necessary to protect your data and systems from loss or damage. Additionally, to the extent that any provision in this section is in conflict with any other term or condition in this Agreement, this section shall supersede such other term(s) and condition(s) with respect to the Unsupported Products, but only to the extent necessary to resolve the conflict. Furthermore, you acknowledge that the Unsupported Products may contain bugs, errors and other problems that could cause system or other failures and data loss. Consequently, Unsupported Products are provided to you "AS IS" and Licensor disclaims any warranty or liability obligations to you of any kind. Maintenance is not available for the Unsupported Products. Licensor may change, suspend, or discontinue any aspect of the Unsupported Products at any time, including the availability of any Unsupported Product, and impose limits on certain features and services or restrict your access to parts or all of Pre-Released. Your Use of the Evaluation or Pre-Release Software is limited to 30 days unless otherwise agreed to in writing by Licensor. The restrictions in **Section 2** herein, apply to your use of Unsupported Products.

To the maximum extent permitted by applicable law, you hereby (a) release and waive all claims against Licensor and its subsidiaries, affiliates, officers, agents, licensors, and employees (collectively "Indemnitees") from liability for claims, damages (actual and consequential), and expenses (including litigation costs and attorneys' fees) arising from or in any way related to your use of any Unsupported Products; and (b) agree to hold harmless and indemnify Indemnitees from and against any third party claims arising from or in any way related to your use of the Unsupported Products, including any liability or expense arising from all claims, losses, damages (actual and consequential), suits, judgments, litigation costs, and attorneys' fees.

**(d)** Licensor's ownership rights in **Section 2** apply to Unsupported Products, including any output and also including any improvements whether based on input from you or not.

**(e)** Prior to returning Unsupported Products to Licensor, you must remove any (i) confidential, proprietary, or personal information, including without limitation, personal health information or personally identifiable information (as such is defined under applicable local law, regulation or directive, including without limitation, in the U.S., the Gramm-Leach-Bliley Act, and Health Insurance Portability and Accountability Act, HITECH Act), and (ii) destroy any removable media such as floppy disks, CDs, or PC Cards which might contain copies of all or any portion of the Unsupported Products. In addition, you are responsible for backing up your data that you may have generated or use in connection with the Unsupported Products. Licensor is not responsible for any of your confidential, proprietary, or personal information or removal thereof; lost or corrupted data; or damaged or lost removable media.

**14. General.** This Agreement, any Software Maintenance and Support Agreement, and any Quote issued by Licensor, constitute the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, arrangements, and understandings between the parties regarding such subject matter. Any maintenance, technical support or other obligations of Licensor shall be set forth in a separate written agreement. Any conflicting or additional terms in your purchase orders or in any of your other documentation are expressly rejected.

This Agreement may be modified only in writing, signed by authorized representatives of both parties. No use of trade, other regular practice, or course of dealing between the parties will be used to modify, interpret, supplement, or alter the terms of this Agreement.

No failure of either party to exercise any power or right hereunder or to insist upon strict compliance with the terms of this Agreement, and no custom or practice of the parties at variance with the terms hereof, will constitute a waiver of either party's right to demand compliance with the terms of this Agreement.

If any provision of this Agreement is determined to be invalid, illegal, or unenforceable, such provision will be severed from the Agreement, and the remainder of this Agreement will be valid and enforceable to the extent permitted by applicable law, provided that the intent of the parties is not materially impaired. The parties will use their best efforts to replace the invalid or unenforceable provision by a provision that, to the extent permitted by law, achieves the purposes intended under the invalid or unenforceable provision.

This Agreement is governed by the laws of the State of New Hampshire without regard to choice of law rules. You hereby agree that the federal and state courts located in said State shall be the exclusive forums in which any dispute arising hereunder may be litigated, and you further agree to submit to the jurisdiction of such courts and to accept service of process with respect to the same.

The parties agree that the United Nations Convention on International Sale of Goods Acts will not apply to this Agreement.

Except for the obligation to make payments, non-performance of either party will be excused to the extent that performance is rendered impossible by strike, fire, flood, acts of God, governmental acts or orders or restrictions, act of terrorism, war, or any other reason where failure to perform is beyond the reasonable control of the non-performing party and not due to its fault or negligence.