



Subscription, Services and Hosting Agreement

This Subscription, Services and Hosting Agreement (“Agreement”) is made by and between the following parties:

Performance Matters LLC , a Utah limited liability company, located at: 7730 South Union Park Avenue, Suite 500 Sandy, Utah 84047 (referred to in this Agreement as “ PM ”) and	Company Name, a State corporation, located at Address1 Address2 City, State Zip Code (referred to in this Agreement as “ Customer ”)
---	---

RECITALS

- A. PM is a provider of internet-based professional growth, development and assessment platforms, products, systems and hosting services for schools, district, educators and other educational institutions and customers.
- B. Customer wishes to engage PM, subscribe to PM’s system, and utilize PM’s services and products to manage its professional development needs.

NOW THEREFORE, Customer agrees to engage PM, and PM agrees to provide the products and perform the services as provided for and subject to the terms and conditions set forth in this Agreement.

1. **SITE SUBSCRIPTION AND PM PRODUCTS AND SERVICES**. During the Term of this Agreement, PM agrees to provide Customer and Customer-identified authorized users (“Authorized Users”) a subscription that includes access to and usage of a PM-hosted, Customer-branded website on the internet (the “Site”) and PM’s internet-based K-12 professional growth system as described in the quote or proposal supplied by PM to Customer, and attached hereto as Exhibit A. The Site will include certain proprietary software of PM and certain content provided by Customer. PM will provide ongoing support and maintenance services for the Professional Growth System, including application software required to support the Products and enhancements when generally made available. In conjunction with the subscription, PM will also provide (a) Implementation Services, (b) Hosting Services, (c) Software and Products, and (d) Training Services, each as set forth in detail in Exhibit A.
 - a. Hosting Services. Unless otherwise specified in Exhibit A or in a separate Service Level Agreement (“SLA”), and subject to routine maintenance and upgrade requirements, PM will use commercially reasonable efforts to have Hosting Services available for the Customer Site at all times. The Customer will be notified by the PM Project Team regarding scheduled system maintenance, product patch release dates and associated information. *Provided, however*, that Hosting Services for the Site do not include internet access at Customer’s or any Authorized User’s location; obtaining and maintaining internet access will be solely Customer’s responsibility and PM shall have no liability for interruptions and outages caused by Customer’s Internet Service Provider.
 - b. Software and other Products. PM will provide Customer license, access to and use of proprietary software for the number of users, the term and at the cost specified in Exhibit A. As provided in Section 5 below, all Software licenses are non-exclusive and non-transferable, and shall terminate on the same date as this Agreement.
 - c. Training Services. Site and Product training and/or documentation and videos for the Customer, as detailed in Exhibit A, will be scheduled as mutually agreed by the parties and must be completed during the initial term of the Agreement. Class size for training is limited to twenty (20) attendees per session; PM may charge extra for additional attendees. Unused training hours will be forfeited at the end of the initial term of the Agreement.
 - d. Service Change Requests. Any Customer requested updates, revisions and enhancements or other changes in cope or price for the Site that are not provided for in Exhibit A must be documented in a Service Change Request (“SCR”) in the form attached as Exhibit B. Each SCR is an amendment to the Agreement, and must be executed by the parties prior PM commencing any of the work requested.

2. **CUSTOMER RESPONSIBILITIES AND OBLIGATIONS.** During the Term of the Agreement, Customer will be responsible for the following:
- a. **Customer Data Format for Import and Implementation.** PM has provided or will provide Customer with specific formatting and content requirements for the customer data that will be imported onto PM's platform (the "Data Import Requirements"). Customer will provide PM with all employee and other Authorized User information in the format set forth in Data Import Requirements as needed to perform the Implementation Services. Customer is responsible for insuring that the customer data file to be imported meets the Data Import Requirements, and if Customer's implementation requires development and processing of custom import files that do not meet the Data Import Requirements, additional charges will apply and will be set forth in an SCR.
 - b. Customer will manage and protect all Authorized User registration, maintenance of passwords and accounts for end-user access, will keep all passwords secure and confidential, and will disable accounts and passwords as appropriate upon termination of any Authorized User. Customer will use commercially reasonable efforts to prevent unauthorized access to its accounts. In the event Customer becomes aware of any breach or unauthorized access to its account(s), Customer will notify PM within forty-eight (48) hours.
 - c. Customer be solely responsible for the accuracy and completeness of Customer Data and all activity in its account and on the Site;
 - d. Customer will use the Site, Products and Services only in accordance with PM's written technical guides and applicable law. Customer may allow authorized third parties to access the Product and Site in compliance with the terms of this Agreement, provided that (i) the access is for the sole benefit of Customer; and (ii) such Customer-authorized third parties are contractually bound to comply with Applicable Law and with the terms of this Agreement.
3. **EFFECTIVE DATE AND TERM.** Performance under this shall be deemed to commence as of the last date of signature below, unless some other date is specified in Exhibit A or in the Customer's Request For Proposal. ("Effective Date"). This Agreement shall continue for an initial term of three years ("Term"), and shall be renewed for successive one-year terms ("Renewal Term") on the anniversary of the Effective Date unless Customer gives PM notice of its intention not to renew at least sixty (60) days prior to the end of the current Term or Renewal Term.
4. **FEES.**
- a. **Fees and Payment Terms.** Customer will pay all fees set forth on Exhibit A within thirty (30) days of receipt of invoice, unless other payment terms have been provided for and agreed in in Exhibit A. Payments not made when due, shall bear interest at the rate of 1.5% per month, or the highest legal rate, whichever is less, commencing as of the due date, until fully paid.
 - b. **Taxes.** If Customer provides PM with a valid tax exemption certificate authorized by the appropriate taxing authority, PM will not charge or collect sales or other taxes as the exemption certificate provides. If no exemption certificate is provided, Customer must pay any taxes, impositions, or other charges imposed or levied by any governmental authority, including any sales, use, value-added, or withholding taxes, in connection with the Invoice (except for any PM income or PM employee taxes).
5. **INTELLECTUAL PROPERTY, OWNERSHIP AND LICENSES.**
- a. **License to Use Products.** PM grants to Customer a limited, non-exclusive, non-transferable license to access and use of each Product for the number of users and for the term specified in Exhibit A. This license is solely for Customer's internal educational and training purposes.
 - b. **Customer Data.** Customer represents and warrants that Customer has appropriate rights to any data and content uploaded or entered into the Site or a Product by Customer ("Customer Data"). All Customer Data remains the property of Customer, as between PM and Customer. Customer grants PM the right to use the Customer Data solely for purposes of performing under this Agreement and in accordance with all applicable federal, state and local laws and regulations ("Applicable Laws"). PM will adopt, implement and maintain commercially reasonable security measures and procedures (including, firewalls, passwords, encryption, commercially available virus protection, access and use of adequate back-up computer servers, and periodic back-up of data) on a continuing basis.

- c. **Restrictions.** Customer may not (i) sell, resell, rent or lease the Professional Growth System, Site, Products, Software, or any other deliverable under this Agreement, (collectively, the “PM System”) or use the PM System in a service provider capacity; (ii) use the PM System to store or transmit infringing, unsolicited marketing emails, libelous, or otherwise objectionable, unlawful or tortious material, or to store or transmit material in violation of third-party rights or Applicable Law; (iii) interfere with or disrupt the integrity or performance of the PM System or attempt to gain unauthorized access to the PM System or their related systems or networks; (iv) use the PM System for any use other than for internal Customer educational or professional development purposes; (v) reproduce, frame, mirror, modify, translate, enhance, decompile, disassemble, copy, download or reverse engineer the PM System, or modify, create derivative works based on the PM System or (vi) access the PM System to build a competitive service or product, or copy any feature, function or graphic for competitive purposes. Any such materials placed on the PM System inconsistent with the foregoing requirements shall be deemed to be a material breach of this Agreement and may be removed by PM.
- d. **Products.** All audio, video and other content, curriculum, documentation, and software (including without limitation applets, animations, and application software) required to support the PM System provided by PM as part of the Subscription are licensed to Customer as follows: PM grants Customer a non-exclusive, non-transferable license during the term of the Agreement to access and use the PM System for internal educational and training purposes solely in connection with this Agreement.
- e. **Artistic and Content Control.** Except as expressly provided otherwise under the Agreement, Customer shall have exclusive artistic and editorial control over the Site, including the Site design and integration of Customer Content. Any changes made to the artistic and editorial content of the Site following Customer’s initial acceptance of the Site, will be subject to a SCR executed by the parties.
- f. **PM’s Reservation of Rights.** The content, documentation, code, software, workflow processes, user interface, website, designs, design concepts, know-how, methodologies, used in or part of the PM System under this Agreement are the sole property of PM and/or its licensors, and all right, title and interest in and to such items, including all associated intellectual property rights, remain solely with PM or its licensors. Customer may not remove or modify any proprietary marking or restrictive legends in the PM System. PM reserves all other rights not expressly granted to Customer in this Agreement.

7. MUTUAL CONFIDENTIALITY.

- a. **Definition of Confidential Information.** Confidential Information means all non-public information including Personally Identifiable Information (“PII”) as defined by applicable law, disclosed by a party (“Discloser”) to the other party (“Recipient”), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure (“Confidential Information”). PM’s Confidential Information includes without limitation the Product, its user interface design and layout, pricing information, the Services or any deliverables.
- b. **Protection of Confidential Information.** The Recipient must use the same degree of care that it uses to protect the confidentiality of its own confidential information (but in no event less than reasonable care) not to disclose or use any Confidential Information of the Discloser for any purpose outside the scope of this Agreement. The Recipient must make commercially reasonable efforts to limit access to Confidential Information of Discloser to those of its employees and contractors who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with Recipient no less restrictive than the confidentiality terms of this Agreement.
- c. **Exclusions.** Confidential Information *excludes* information that: (i) is or becomes generally known to the public without breach of any obligation owed to Discloser, (ii) was known to the Recipient prior to its disclosure by the Discloser without breach of any obligation owed to the Discloser, (iii) is received from a third party without breach of any obligation owed to Discloser, or (iv) was independently developed by the Recipient without use or access to the Confidential Information. The Recipient may disclose Confidential Information to the extent required by law or court order, but will provide the non-disclosing party with advance notice to seek a protective order.

8. INDEMNIFICATION.

- a. PM will defend or settle any third party claim against Customer to the extent that such claim alleges that PM technology used to provide the Site, Services or Products violates a copyright, patent, trademark or other intellectual property right, if Customer, promptly notifies PM of the claim in writing, cooperates with PM in the defense, and allows PM to solely control the defense or settlement of the claim. PM will pay infringement claim defense costs, PM-negotiated settlement amounts, and court awarded damages incurred as part of its obligations under this Agreement. If such a claim appears likely, then PM may modify the Site, Services or Products, procure the necessary rights, or replace the infringing part of the Site, Services or Products with a functional equivalent. If PM determines that none of these are reasonably available, then PM may terminate access to the Site, Services or Products and refund any prepaid and unused fees. PM has no obligation for any claim, in whole or in part, arising from information, items or technology not provided by PM or for any third party web services not owned by PM. THIS SECTION CONTAINS CUSTOMER'S EXCLUSIVE REMEDIES AND PM'S SOLE LIABILITY FOR INTELLECTUAL PROPERTY INFRINGEMENT CLAIMS.
- b. To the extent permitted under applicable law, Customer will defend, indemnify and hold harmless PM from and against any third party claims, losses, damages, settlements, penalties, fines, costs, or expenses (including reasonable attorneys' fees) that arise from or relate to (i) Customer's negligence, misconduct or breach of this Agreement, (ii) any Customer Data or third party content, products, services or systems, including their integration or their required third party integration with the Service, and (III) any Customer violation of applicable law which results in third party claim against PM.

9. WARRANTY AND WARRANTY EXCLUSION.

- a. **Compliance Warranty.** Each party will comply with, and will cause each of its employees, agents, and contractors to comply with all laws applicable to its performance under this Agreement, including without limitation the Family Educational Rights and Privacy Act ("FERPA") and the Children's Online Privacy Protection Act ("COPPA").
- b. **PM Service Warranty.** PM warrants that commercially reasonable efforts will be made to maintain the online availability of the Site, Services or Products. CUSTOMER'S EXCLUSIVE REMEDY AND PM'S ENTIRE LIABILITY UNDER THIS WARRANTY WILL BE FOR PM TO REPAIR THE NON-CONFORMING SERVICES OR PRODUCT, OR IF PM CANNOT MAKE SUCH REPAIR WITHIN A REASONABLE PERIOD OF TIME, THEN PM MAY TERMINATE ACCESS TO THE SITE, SERVICES OR PRODUCTS AND REFUND THE PORTION OF THE FEE ATTRIBUTABLE TO SUCH NON-CONFORMING SERVICE.
- c. **DISCLAIMERS.** ALL LICENSED MATERIAL IS PROVIDED "AS IS" AND WITH ALL FAULTS. EXCEPT FOR THE ABOVE WARRANTIES, THE SITE, SERVICES AND PRODUCTS ARE PROVIDED ON AN "AS-IS" AND "WHEN AVAILABLE" BASIS. ALL OTHER REPRESENTATIONS AND WARRANTIES CONCERNING THE LICENSED MATERIAL, THE SITE, SERVICES OR PRODUCTS ARE HEREBY EXPRESSLY DISCLAIMED TO THE EXTENT ALLOWED BY LAW, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT THE OPERATION OR CONNECTIVITY OF THE SITE, SERVICES OR PRODUCTS WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT THE SITE, SERVICES OR PRODUCTS WILL BE FREE OF ALL POSSIBLE METHODS OF UNAUTHORIZED ACCESS, ATTACK, OR INTRUSION.

10. LIMITATIONS OF LIABILITY.

- a. **EXCLUSION OF INDIRECT DAMAGES.** PM IS NOT LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, COSTS OF DELAY; LOSS OF DATA, RECORDS OR INFORMATION; AND LOST PROFITS), EVEN IF IT KNOWS OF THE POSSIBILITY OF SUCH DAMAGE OR LOSS.
- b. **TOTAL LIMIT ON LIABILITY.** PM'S TOTAL LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT (WHETHER IN CONTRACT, TORT OR OTHERWISE) DOES NOT EXCEED THE AMOUNT PAID BY CUSTOMER WITHIN THE 12-MONTH PERIOD PRIOR TO THE EVENT THAT GAVE RISE TO THE LIABILITY.

11. TERM AND TERMINATION.

- a. Term. The term of this Agreement shall commence on the Effective Date. The Agreement will automatically renew for an additional term (detailed in Exhibit A) unless a party provides sixty (60) days written notice prior to the renewal date.
- b. Mutual Termination for Material Breach. Except for non-payment, if either party is in material breach of this Agreement, the other party may terminate this Agreement at the end of a written 30-day notice/cure period, if the breach has not been cured.
- d. Suspension for Violations of Law. PM may temporarily suspend the Service or remove the applicable Customer Data, or both, if PM in good faith believes that Customer has violated any Applicable Law as part of using the the PM System.
- e. Effect of Termination. Upon termination or expiration of the Agreement:
 - 1. PM will end Customer's Subscription, and terminate Customer's access to the Site, Services, Products, and related software.
 - 2. Customer will immediately pay any fees due and owing prior to the termination date.
 - 3. Upon written request of Customer, PM will make the Site and any Product available for Customer to export customer data for 60 days after termination.
- f. Funding-Out Clause. Customer's payment obligation may conditioned upon the availability of funds that are appropriated or allocated by the applicable government agency. If funds are not allocated, Customer may terminate this Agreement at the end of the period for which funds are available. Customer must notify PM in writing before such termination, and will provide PM sufficient legal documentary proof of the non-availability of the funds. If Customer terminates Agreement due to lack of funding, Customer agrees not to acquire similar services from a third party for the remainder of the term of the Agreement.
- g. Non-payment of Fees. PM may terminate the Agreement and Customer's access to the Site, Services, Products and associated software for Customer's non-payment of amounts owed.

12. GENERAL.

- a. Assignment. This Agreement will bind and inure to the benefit of each party's permitted successors and assigns. Neither party may assign this Agreement, in whole or in part, without the other party's prior written consent; provided however that PM may assign this Agreement to a purchaser of all or substantially all of its assets or its business provided that the assignee agrees to be bound by all of PM's duties and obligations under this Agreement. Any attempt to assign this Agreement without such consent will be null and void.
- b. Severability. In the event that any provision of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, that provision will be enforced to the fullest extent permitted by law, and the remaining provisions shall remain in full force and effect.
- c. Force Majeure. Except for payments due under this Agreement, neither party will be responsible for any failure to perform due to causes beyond its reasonable control including acts of God, war, riot, embargoes, acts of civil or military authorities, denial of or delays in processing of export license applications, fire, floods, earthquakes, accidents, strikes, failure of the internet, or fuel crises, provided that such party gives prompt written thereof to the other party. The time for performance will be extended for a period equal to the duration of the Force Majeure, but in no event longer than sixty (60) days, at which time this Agreement will be deemed terminated by mutual consent of the parties subject to each party's post-termination obligations set forth in this Agreement.
- d. Notices. All notices under this Agreement will be deemed given when delivered personally, sent by confirmed facsimile transmission, or sent by certified or registered U.S. mail, return-receipt requested, or nationally recognized express courier, to the address shown above, attention the parties' authorized representative, or as may otherwise be specified by either party.
- e. Independent Contractors. The parties to this Agreement are independent contractors. There is no relationship of partnership, joint venture, employment, franchise, or agency between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.

- f. Waiver. No failure of either party to exercise or enforce any of its rights under this Agreement will act as a waiver of such rights.
- g. Export Control. The sale, resale, or other disposition of Products and any related technology or documentation are subject to the export control laws, regulations, and orders of the United States of America and may be subject to the export and/or import control laws, regulations, and orders of other countries. Customer agrees to comply with all such laws, regulations, and orders and acknowledges that it shall not directly or indirectly export or import any Products to any country to which such export, import, or transmission is restricted or prohibited. Customer acknowledges and agrees that Customer is responsible to obtain any license to export, re-export, import, or transmit as may be required.
- h. Governing Law. This Agreement will be governed by and construed in accordance with the laws of the state where Customer is located.
- i. Money Damages Insufficient. Any breach by a party of this Agreement or violation of the other party's intellectual property rights could cause irreparable injury or harm to the other party. The other party may seek a court order to stop any breach or avoid any future breach.
- j. RFP Terms And Conditions. If the proposal or quote in Exhibit A has been supplied to Customer in response to a Customer-issued Request for Proposal ("RFP"), any terms and requirements of such RFP that are identified as "mandatory" or similar terms, shall be deemed incorporated herein by reference, but only to the extent such terms and requirements are not inconsistent with the terms of this Agreement. If any additional documents materials have been supplied by PM in response to an RFP ("Proposal Documents"), such Proposal Documents are also deemed incorporated into this Agreement by reference. In the event there are any conflicting terms in any Customer purchase order, form, or other purchasing document, the terms of this Agreement shall control.
- k. Entire Agreement: Amendment. This Agreement, the attached Exhibits, and any other documents incorporated by reference comprise the complete agreement between the parties with respect to the subject matter hereof, superseding and replacing any and all prior agreements, communications, and understandings (both written and oral) regarding such subject matter. This Agreement may only be modified by a written agreement executed by both parties.

IN WITNESS WHEREOF, the Parties have caused this Subscription, Services and Hosting Agreement to be executed as of the Effective Date.

Customer: _____

Performance Matters LLC

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____



EXHIBIT A

FEES, IMPLEMENTATION REQUIREMENTS and PRICING

District Pricing Summary:

- a. Standard system concurrency user rate is 3% of all portal users.
- b. The Products are provided with “AS IS” functionality available on the Effective Date of this contract.
- c. No custom work is included in the listed price.

1. **SITE IMPLEMENTATION FEES.** The Site Implementation Fees are based on the standard hours required by PM to perform the Baseline Site setup. Any additional hours needed to complete the Baseline Site setup will be addressed in a SCR to be agreed upon and executed by the parties. Implementation fees are detailed in the chart below:

Site Implementation Services	Hours	Fee
<ul style="list-style-type: none"> • XXX • XXX • XXX 	XXX	\$XXX
Total of all Site Implementation Services:		\$xx,xxx

2. **TRAINING SERVICES.** Training must be taken within the initial term of this contract.

Training Services	Quantity	Fee
On-site Training Days		\$xxx
Bundle of 3 Training Videos		\$xxx
Total of all Training Services:		\$xx,xxx

3. **SUBSCRIPTION AND HOSTING FEES.**

Subscription Fees listed in the chart below are for Year 1 of the contract and include hosting services. All subscription and hosting fees will be increased by five percent (5%) annually on the anniversary of the Effective Date for the term of the Agreement.

Product	Per User Cost	Subscription Term	Subscription Fee
Total Subscriptions			\$xxx,xxx

4. **INVOICING:**

Milestone	Fee Due Upon Milestone Completion	Invoice Terms
		NET 30
		NET 30
		NET 30



Exhibit B
Form of Service Change Request (SCR)

Service Change Request for <CLIENT NAME>

Date Submitted		Request Number	
Change Title		Cost Estimate	
Completed By (PM):			
Requested By (Client):		Ongoing Cost	
Reason (optional)			

High Level Description

Approved / Denied	Explanation

PM Executive Sponsor	Title	Date
----------------------	-------	------

Client Executive Sponsor	Title	Date
--------------------------	-------	------

- Pricing reflects current Performance Matters pricing
- Pricing is valid until <90 DAYS FROM DATE SUBMITTED>
- Performance Matters software fees are due annually on the contract or contract renewal date with invoice terms NET 30
- Performance Matters software fees include new software releases, maintenance patches, hosting, managed backup, and support
- Performance Matters services fees are due upon completion of delivery milestones established upon contract

www.performancematters.com

Corporate Headquarters 7730 Union Park Ave, Suite 500 Sandy, UT 84047