

Active Solutions (Windsor) Limited

Terms & Conditions

Last Update: 16/03/2018

**1. Interpretation**

The definitions and rules of interpretation in this condition apply in these terms and conditions.

**1.1 Definitions:**

**Business Day:** a day other than a Saturday, Sunday or public holiday in England, when banks in London are open for business.

**Contract:** the contract between the Supplier and the Customer for the supply of Goods and/or Services in accordance with these conditions.

**Contract Year:** a 12-month period commencing with the date of the Contract or any anniversary of it.

**Customer:** the person, school, firm or company who purchases Services from the Supplier.

**Data Protection Legislation:** up to but excluding 25 May 2018, the Data Protection Act 1998 and thereafter (i) unless and until the GDPR is no longer directly applicable in the UK, the GDPR and any national implementing laws, regulations and secondary legislation, as amended or updated from time to time, in the UK and then (ii) any successor legislation to the GDPR or the Data Protection Act 1998.

**Deliverables:** all products and materials developed by the Supplier in relation to the Project in any media, including, without limitation, computer programs, data, diagrams, reports and specifications (including drafts).

**GDPR:** General Data Protection Regulation ((EU) 2016/679).

**Goods:** the goods (or any part of them) ordered by the Customer pursuant to clause 3.1.

**Intellectual Property Rights:** patents, rights to inventions, copyright and related rights, trade marks, trade names, domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, topography rights, moral rights, rights in confidential information (including without limitation know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered, and including without limitation all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world.

**Pre-existing Materials:** materials which existed before the commencement of the Project.

**Project:** the project as described in the Project Plan.

**Project Milestone:** a date by which a part of the Project is estimated to be completed, as set out in the Project Plan.

**Project Plan:** the detailed plan set out in the Supplier's quotation or overleaf (as the case may be) describing the Project and setting out the estimated timetable (including without limitation Project Milestones) and responsibilities of each of the parties for, or in connection with, the provision of the Goods and/or Services by the Supplier in accordance with the Contract.

**Services:** the services to be provided by the Supplier under the Contract including, where the Customer has requested and ordered them, the Support Services.

**Software:** any operating system installed on the Goods and/or Deliverables.

**Supplier:** Active Solutions (Windsor) Limited a company registered in England and Wales with company number 10820639 whose registered office is at Suite 556, 24-28 St Leonards Road, Windsor, Berkshire, SL4 3BB.

**Support Services:** the support services more particularly described in any schedule of support which may be provided by the Supplier to the Customer from time to time.

**VAT:** value added tax chargeable under English law for the time being and any similar additional tax.

- 1.2 Condition, Schedule and paragraph headings shall not affect the interpretation of this agreement.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural include the singular.
- 1.6 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 1.7 A reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 1.8 A reference to **writing** or **written** includes faxes but not email.

1.9 References to conditions and Schedules are to the conditions and Schedules of this agreement and references to paragraphs are to paragraphs of the relevant Schedule.

## **2. Application of conditions**

2.1 These conditions shall:

- (a) apply to and be incorporated in the Contract; and
- (b) prevail over any inconsistent terms or conditions contained in, or referred to in, the Customer's purchase order, confirmation of order, or specification, or implied by law, trade custom, practice or course of dealing.

2.2 No addition to, variation of, exclusion or attempted exclusion of any term of the Contract shall be binding on the Supplier unless in writing and signed by a duly authorised representative of the Supplier.

## **3. Effect of order**

3.1 The Customer's order (whether a formal purchase order, or a verbal or written request for Goods and/or Services) constitutes an offer by the Customer to purchase the Goods and/or Services specified in it on these conditions; accordingly, the execution and return of the acknowledgement copy of a purchase order form by the Supplier, or the Supplier's commencement or execution of work pursuant to the Customer's order, or the Supplier's written acceptance of the Customer's order shall establish a contract for the supply and purchase of those Goods and/or Services on these conditions. The Customer's standard terms and conditions (if any) attached to, enclosed with, or referred to in, any order shall not govern the Contract. These conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.

3.2 Any quotation given by the Supplier shall not constitute an offer, and is only valid for a period of 20 Business Days from its date of issue.

3.3 Any samples, drawings, descriptive matter or advertising issued by the Supplier and any descriptions of the Goods or illustrations or descriptions of the Services contained in the Supplier's catalogues or brochures or website are issued or published for the sole purpose of giving an approximate idea of the Services and/or Goods described in them. They shall not form part of the Contract or have any contractual force.

## **4. Supplier's obligations**

4.1 The Supplier shall use reasonable endeavours to manage and complete the Project, and to deliver the Deliverables to the Customer, in accordance in all material respects with the Project Plan.

4.2 The Supplier shall use reasonable endeavours to meet the performance dates specified in the Project Plan, but any such dates shall be estimates only and time shall not be of the essence of the Contract.

## 5. Delivery of Goods

5.1 The Supplier shall deliver the Goods to the location set out in the Customer's order or such other location as the parties may agree (**Delivery Location**) at any time after the Supplier notifies the Customer that the Goods are ready.

5.2 Delivery of the Goods shall be completed on the completion of unloading of the Goods at the Delivery Location.

5.3 Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. The Supplier shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide the Supplier with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

5.4 If the Supplier fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. The Supplier shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event or the Customer's failure to provide the Supplier with adequate delivery instructions for the Goods or any relevant instruction related to the supply of the Goods.

5.5 If the Customer fails to accept delivery of the Goods within three Business Days of the Supplier notifying the Customer that the Goods are ready, then except where such failure or delay is caused by a Force Majeure Event or by the Supplier's failure to comply with its obligations under the Contract in respect of the Goods:

- (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the third Business Day following the day on which the Supplier notified the Customer that the Goods were ready; and
- (b) the Supplier shall store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance).

5.6 If ten Business Days after the Supplier notified the Customer that the Goods were ready for delivery the Customer has not accepted delivery of them, the Supplier may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.

5.7 The Supplier may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

## **6. Quality of Goods**

6.1 The Supplier warrants that on delivery the Goods shall:

- (a) conform in all material respects with their description; and
- (b) be free from material defects in design, material and workmanship.

6.2 Subject to clause 6.3, the Supplier shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full if:

- (a) the Customer gives notice in writing within three Business Days of delivery;
- (b) the Supplier is given a reasonable opportunity of examining such Goods; and
- (c) the Customer (if asked to do so by the Supplier) returns such Goods to the Supplier's place of business at the Customer's cost.

6.3 The Supplier shall not be liable for the Goods' failure to comply with the warranty in clause 6.1 if:

- (a) the Customer makes any further use of such Goods after giving a notice in accordance with clause 6.2;
- (b) the defect arises because the Customer failed to follow the Supplier's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice;
- (c) the defect arises as a result of the Supplier following any drawing, design or specification supplied by the Customer;
- (d) the Customer alters or repairs such Goods without the written consent of the Supplier;
- (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions; or
- (f) the Goods differ from their description as a result of changes made to ensure they comply with applicable statutory or regulatory standards.

6.4 Except as provided in this clause 6, the Supplier shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 6.1.

6.5 The terms of these Conditions shall apply to any repaired or replacement Goods supplied by the Supplier.



## **7. Title and risk**

- 7.1 The risk in the Goods shall pass to the Customer on completion of delivery.
- 7.2 Title to the Goods shall not pass to the Customer until the Supplier receives payment in full (in cash or cleared funds) for the Goods and any other goods and/or services that the Supplier has supplied to the Customer in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums; and
- 7.3 Until title to the Goods has passed to the Customer, the Customer shall:
- (a) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as the Supplier's property;
  - (b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
  - (c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on the Supplier's behalf from the date of delivery;
  - (d) notify the Supplier immediately if it becomes subject to any of the events listed in clause 15.1(d) – 15.1(k); and
  - (e) give the Supplier such information relating to the Goods as the Supplier may require from time to time.
- 7.4 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 15.1(d) – 15.1(k), then, without limiting any other right or remedy the Supplier may have at any time:
- (a) require the Customer to deliver up all Goods in its possession which have not been resold, or irrevocably incorporated into another product; and
  - (b) if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

## **8. Customer's obligations**

- 8.1 The Customer shall:
- (a) co-operate with the Supplier in all matters relating to the Project;
  - (b) provide in a timely manner such access to the Customer's premises and data, and such office accommodation and other facilities, as is requested by the Supplier;
  - (c) provide in a timely manner such information as the Supplier may request, and ensure that such information is accurate in all material respects; and

(d) be responsible (at its own cost) for preparing the relevant premises for the supply of the Services and/or Goods.

8.2 If the Supplier's performance of its obligations under the Contract is prevented or delayed by any act or omission of the Customer or the Customer's agents, sub-contractors or employees, the Customer shall in all circumstances be liable to pay to the Supplier on demand all reasonable costs, charges or losses sustained or incurred by it (including, without limitation, any direct, indirect or consequential losses, loss of profit and loss of reputation, loss or damage to property, injury to or death of any person and loss of opportunity to deploy resources elsewhere), subject to the Supplier confirming such costs, charges and losses to the Customer in writing.

8.3 The Customer shall not, without the prior written consent of the Supplier, at any time from the date of the Contract to the expiry of six months after the completion of the Services, solicit or entice away from the Supplier or employ or attempt to employ any person who is, or has been, engaged as an employee or sub-contractor of the Supplier, except that the Customer shall not be in breach of this clause 8.3 if it hires an employee or sub-contractor of the Supplier as a result of a recruitment campaign not specifically targeted to any employees or sub-contractors of the Supplier.

8.4 Any consent given by the Supplier in accordance with clause 8.3 shall be subject to the Customer paying to the Supplier on demand a sum equivalent to 20% of the then current annual remuneration of the Supplier's employee or sub-contractor or, if higher, 20% of the annual remuneration to be paid by the Customer to such employee or sub-contractor.

## **9. Change control**

9.1 If either party wishes to change the scope of the Services, it shall submit details of the requested change to the other in writing.

9.2 If either party requests a change to the scope or execution of the Services, the Supplier shall, within a reasonable time, provide a written estimate to the Customer of:

- (a) the likely time required to implement the change;
- (b) any variations to the Supplier's charges arising from the change;
- (c) the likely effect of the change on the Project Plan; and
- (d) any other impact of the change on the terms of the Contract.

9.3 If the Supplier requests a change to the scope of the Services, the Customer shall not unreasonably withhold or delay consent to it.

9.4 If the Customer wishes the Supplier to proceed with the change, the Supplier has no obligation to do so unless and until the parties have agreed in writing on the necessary variations to its charges, the Project Plan and any other relevant terms of the Contract to take account of the change.

## **10. Charges and payment**

10.1 Clause 10.2 shall apply if the Services (excluding the Support Services) are to be provided on a time-and-materials basis. Clause 10.3 and clause 10.4 shall apply if the Services (excluding the Support Services) are to be provided for a fixed price. Clause 10.5 and 10.6 shall apply if the Customer has ordered Goods. Clause 10.7 shall apply if the Customer has ordered Support Services. The remainder of this clause 10 shall apply in all cases.

10.2 Where the Services (excluding the Support Services) are provided on a time-and-materials basis:

- (a) the charges payable for the Services shall be calculated in accordance with the Supplier's daily fee rates as set out in the Supplier's quotation or as notified to the Customer from time to time;
- (b) the Supplier's daily fee rates are calculated on the basis of an eight-hour day worked between 8.30 am and 6.00 pm on weekdays (excluding weekends and public holidays);
- (c) the Supplier shall be entitled to charge at an overtime rate of 50% of the normal rate for part days and for time worked by members of the project team outside the hours referred to in clause 10.2(b) on a pro-rata basis;
- (d) the Supplier shall ensure that all members of the project team complete time sheets recording time spent on the Project, and the Supplier shall use such time sheets to calculate the charges covered by each monthly invoice referred to in clause 10.2(e); and
- (e) the Supplier shall invoice the Customer monthly in arrears for its charges for time, expenses and materials (together with VAT where appropriate) for the month concerned, calculated as provided in this clause 10. Any expenses, materials and third party services shall be invoiced by the Supplier. Each invoice shall set out a summary of the time spent by the project team and provide a breakdown of any materials and work involved where appropriate

10.3 Where the Services (excluding the Support Services) are provided for a fixed price the total price for the Services shall be the amount set out in the Project Plan. The total price shall be paid to the Supplier in instalments as set out in the Project Plan on its achieving the corresponding Project Milestone. On achieving a Project Milestone, the Supplier



shall invoice the Customer for the charges that are then payable, together with expenses and the costs of materials (and VAT, where appropriate).

- 10.4 Any fixed price contained in the Project Plan excludes VAT, which the Supplier shall add to its invoices at the appropriate rate.
- 10.5 The price for Goods:
- (a) shall be the price set out in the Supplier's quotation or as notified to the Customer from time to time; and
  - (b) shall be exclusive of all costs and charges of packaging, insurance, transport of the Goods and VAT, which shall be invoiced to the Customer.
- 10.6 In respect of Goods, the Supplier shall invoice the Customer on or at any time after completion of delivery.
- 10.7 Where the Customer has requested that the Supplier provides any Support Services, the price for the Support Services shall be set out in the Project Plan and shall be payable annually in advance unless agreed otherwise in writing.
- 10.8 The Customer shall pay each invoice submitted to it by the Supplier in full, and in cleared funds, within 14 Business Days of the date of the invoice.
- 10.9 Without prejudice to any other right or remedy that the Supplier may have, if the Customer fails to pay the Supplier on the due date the Supplier may:
- (a) charge interest on such sum from the due date for payment at the annual rate of 5% above the base lending rate from time to time of Bank of England, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment;
  - (b) suspend all Services until payment has been made in full; and
  - (c) cancel any order or suspend any further deliveries of Goods to the Customer until payment has been made in full.
- 10.10 The Supplier reserves the right, by giving written notice to the Customer at any time before delivery or provision, to increase the price of the Goods and/or Services to reflect any increase in the cost to the Supplier which is due to any factor beyond the control of the Supplier (including, without limitation, any foreign exchange fluctuation, currency regulation, alteration of duties, significant increase in the costs of labour, materials or other costs of manufacture) any change in delivery dates, quantities or specifications for the Goods and Services which are requested by the Customer, or any delay caused by any instructions of the Customer or failure of the Customer to give the Supplier adequate information or instructions.

- 10.11 Time for payment shall be of the essence of the Contract.
- 10.12 All payments payable to the Supplier under the Contract shall become due immediately on termination of the Contract, despite any other provision. This condition is without prejudice to any right to claim for interest under the law, or any such right under the Contract.
- 10.13 All amounts due under this agreement shall be paid by the Customer to the Supplier in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law). The Supplier may, without prejudice to any other rights it may have, set off any liability of the Customer to the Supplier against any liability of the Supplier to the Customer.

## **11. Intellectual Property Rights and Software**

- 11.1 All Intellectual Property Rights and all other rights in the Deliverables shall be owned by the Supplier. The Supplier hereby licenses all such rights to the Customer free of charge and on a non-exclusive, non-transferable and worldwide basis to such extent as is necessary to enable the Customer to make reasonable use of the Deliverables and the Services as is envisaged by the parties. If the Supplier terminates the Contract under clause 15.1, this licence will automatically terminate.
- 11.2 The Customer acknowledges that the Customer's use of rights in Pre-existing Materials is conditional on the Supplier obtaining a written end-user licence (or sub-licence) of such rights from the relevant licensor or licensors on such terms as will entitle the Supplier to license such rights to the Customer.
- 11.3 If the Supplier refers to a software licence in its quotation or acknowledgment of order, the price of the Goods/Services includes the licence fee for the Customer's right to use the Software.
- 11.4 If the Customer is provided with any operating system software licence in respect of the Software, the Customer shall sign and return it to the Supplier within seven days of installation of the software, unless the licence has been supplied on a "shrink-wrap" or "click-wrap" basis.
- 11.5 If no software licence has been provided to the Customer, the Customer hereby accepts a non-exclusive, non-transferable licence to use the Software on the following conditions:
- (a) the Customer shall not copy (except to the extent permissible under applicable law which is not capable of exclusion by agreement) or for normal operation of the Goods/Deliverables), reproduce, translate, adapt, vary or modify the

software, nor communicate it to any third party, without Supplier's prior written consent;

- (b) the Customer shall not use the Software on any equipment other than the Goods/Deliverables, and shall not remove, adapt or otherwise tamper with any copyright notice, legend or logo which appears in or on the Software on the medium on which it resides;
- (c) such licence shall be terminable by either party on 28 days' written notice, provided that the Supplier terminates only if the continued use or possession of the Software by the Customer infringes the developer's or a third party's rights, or the Supplier is compelled to do so by law, or if the Customer has failed to comply with any term of the Contract; and
- (d) on or before the expiry of this licence, the Customer shall return to the Supplier all copies of the Software in its possession.

## **12. Confidentiality and Supplier's property**

- 12.1 The Customer shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Customer by the Supplier or its agents, and any other confidential information concerning the Supplier's business or its products which the Customer may obtain. The Customer shall restrict disclosure of such confidential material to such of its employees, agents or sub-contractors as need to know it for the purpose of discharging the Customer's obligations to the Supplier, and shall ensure that such employees, agents or sub-contractors are subject to obligations of confidentiality corresponding to those which bind the Customer.
- 12.2 Each party may be given access to Confidential Information from the other party in order to perform its obligations under this agreement. A party's Confidential Information shall not be deemed to include information that:
- (a) is or becomes publicly known other than through any act or omission of the receiving party;
  - (b) was in the other party's lawful possession before the disclosure;
  - (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
  - (d) is independently developed by the receiving party, which independent development can be shown by written evidence.
- 12.3 Subject to clause 12.5, each party shall hold the other's Confidential Information in confidence and not make the other's Confidential Information available to any third party,

or use the other's Confidential Information for any purpose other than the implementation of this agreement.

- 12.4 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 12.5 A party may disclose Confidential Information to the extent such Confidential Information is required to be disclosed by law, by any governmental or other regulatory authority or by a court or other authority of competent jurisdiction, provided that, to the extent it is legally permitted to do so, it gives the other party as much notice of such disclosure as possible and, where notice of disclosure is not prohibited and is given in accordance with this clause 12.5, it takes into account the reasonable requests of the other party in relation to the content of such disclosure.
- 12.6 All materials, equipment and tools, drawings, specifications and data supplied by the Supplier to the Customer shall at all times be and remain the exclusive property of the Supplier, but shall be held by the Customer in safe custody at its own risk and maintained and kept in good condition by the Customer until returned to the Supplier, and shall not be disposed of or used other than in accordance with the Supplier's written instructions or authorisation.
- 12.7 The above provision of this clause 12 shall survive termination of the Contract, however arising.

### **13. Data protection and data processing**

- 13.1 Both parties will comply with all applicable requirements of the Data Protection Legislation. This clause 13 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Legislation.
- 13.2 The parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the data controller and the Supplier is the data processor (where Data Controller and Data Processor have the meanings as defined in the Data Protection Legislation).
- 13.3 Without prejudice to the generality of clause 13.1, the Customer will ensure that it has all necessary appropriate consents and notices in place to enable lawful transfer of the Personal Data (as defined in the Data Protection Legislation) to the Supplier for the duration and purposes of the Contract.

13.4 Without prejudice to the generality of clause 13.1, the Supplier shall, in relation to any Personal Data processed in connection with the performance by the Supplier of its obligations under the Contract:

- (a) process that Personal Data only on the written instructions of the Customer unless the Supplier is required by the laws of any member of the European Union or by the laws of the European Union applicable to the Supplier to process Personal Data (**Applicable Data Processing Laws**). Where the Supplier is relying on laws of a member of the European Union or European Union law as the basis for processing Personal Data, the Supplier shall promptly notify the Customer of this before performing the processing required by the Applicable Data Processing Laws unless those Applicable Data Processing Laws prohibit the Supplier from so notifying the Customer;
- (b) ensure that it has in place appropriate technical and organisational measures, reviewed and approved by the Customer, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to Personal Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
- (c) ensure that all personnel who have access to and/or process Personal Data are obliged to keep the Personal Data confidential; and
- (d) not transfer any Personal Data outside of the European Economic Area unless the prior written consent of the Customer has been obtained and the following conditions are fulfilled:
  - (i) the Customer or the Supplier has provided appropriate safeguards in relation to the transfer;
  - (ii) the Data Subject (as defined in the Data Protection Legislation) has enforceable rights and effective legal remedies;
  - (iii) the Supplier complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred; and
  - (iv) the Supplier complies with reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data;



- (e) assist the Customer, at the Customer's cost, in responding to any request from a Data Subject and in ensuring compliance with its obligations under the Data Protection Legislation with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
- (f) notify the Customer without undue delay on becoming aware of a Personal Data breach;
- (g) at the written direction of the Customer, delete or return Personal Data and copies thereof to the Customer on termination of the agreement unless required by Applicable Data Processing Law to store the Personal Data; and
- (h) maintain complete and accurate records and information to demonstrate its compliance with this clause 13.

13.5 The Customer consents to the Supplier appointing third parties to act as third-party processors of Personal Data under this agreement. Such third-party processors may include: Apple, Inc.; VMware, Inc.; Cisco Systems, Inc.; Dropbox International Unlimited Company; Xero (UK) Limited; SiteGround Hosting Limited; Fasthosts Internet Limited; Microsoft Corporation; Citrix Systems, Inc; Sophos Group plc; and Amazon Web Services, Inc.. This list is not exhaustive. The Supplier confirms that it has entered or (as the case may be) will enter with the third-party processor into a written agreement substantially on the third-party's standard terms of business. As between the Customer and the Supplier, the Supplier shall remain fully liable for all acts or omissions of any third-party processor appointed by it pursuant to this clause 13.5. The Supplier shall inform Customer at least 14 days in advance of any intended changes concerning the addition or replacement of any third-party processor, and if the Customer objects to any such changes before their implementation, then the Customer may terminate the Contract on seven days' notice, provided that such notice must be given within the period of seven days following the date that the Supplier informed the Customer of the intended changes.

13.6 Either party may, at any time on not less than 30 days' notice, revise this clause 13 by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when replaced by attachment to the Contract).

13.7 The Supplier may monitor, record, store and use any telephone, email or other communication with the Customer in order to check any instructions given to the Supplier, for training purposes, for crime prevention and to improve the quality of Supplier's customer service.

## 14. Limitation of liability

- 14.1 The following provisions set out the entire financial liability of the Supplier (including without limitation any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:
- (a) any breach of the Contract howsoever arising;
  - (b) any use made by the Customer of the Goods, the Services, the Deliverables or any part of them; and
  - (c) any representation, misrepresentation (whether innocent or negligent), statement or tortious act or omission (including without limitation negligence) arising under or in connection with the Contract.
- 14.2 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.
- 14.3 Nothing in these conditions excludes the liability of the Supplier:
- (a) for death or personal injury caused by the Supplier's negligence; or
  - (b) for fraud or fraudulent misrepresentation.
- 14.4 Subject to clause 14.2 and clause 14.3:
- (a) the Supplier shall not in any circumstances be liable, whether in tort (including without limitation for negligence or breach of statutory duty howsoever arising), contract, misrepresentation (whether innocent or negligent) or otherwise for:
    - (i) loss of profits; or
    - (ii) loss of business; or
    - (iii) depletion of goodwill or similar losses; or
    - (iv) loss of anticipated savings; or
    - (v) loss of goods; or
    - (vi) loss of contract; or
    - (vii) loss of use; or
    - (viii) loss or corruption of data or information; or
    - (ix) any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.
  - (b) the Supplier's total liability in contract, tort (including without limitation negligence or breach of statutory duty howsoever arising), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be

limited to the total charges paid by the Customer under the Contract in any Contract Year in which the breaches occurred.

- 14.5 The Customer shall indemnify the Supplier against all damages, costs, claims and expenses suffered by arising from loss or damage to any equipment (including that of third parties) caused by the Customer, its agents or employees.
- 14.6 Where the Customer has requested that the Supplier provides any Support Services the Supplier shall have no obligation to provide the Support Services where faults arise from:
- (a) misuse, incorrect use of or damage to any software from whatever cause (other than any act or omission by the Supplier), including failure or fluctuation of electrical power;
  - (b) failure to maintain the necessary environmental conditions for use of the relevant software and/or hardware;
  - (c) use of the software and/or hardware in combination with any equipment or software not provided by the Supplier or not designated by the Supplier for use with the software and/or hardware, or any fault in any such equipment or software;
  - (d) relocation or installation of the software and/or hardware by any person other than the Supplier or a person acting under the Supplier's instructions; or
  - (e) operator error.

## **15. Termination**

- 15.1 Without prejudice to any other rights or remedies to which the Supplier may be entitled, the Supplier may terminate the Contract without liability to the Customer if:
- (a) the Customer fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 14 days after being notified in writing to make such payment;
  - (b) the Customer commits a material breach of any other term of this agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 14 days after being notified in writing to do so;
  - (c) the Customer repeatedly breaches any of the terms of this agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this agreement;
  - (d) the Customer suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

- (e) the Customer commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of the Customer with one or more other companies or the solvent reconstruction of the Customer;
- (f) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the Customer other than for the sole purpose of a scheme for a solvent amalgamation of the Customer with one or more other companies or the solvent reconstruction of the Customer;
- (g) an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over the Customer;
- (h) the holder of a qualifying floating charge over the assets of the Customer has become entitled to appoint or has appointed an administrative receiver;
- (i) a person becomes entitled to appoint a receiver over the assets of the Customer or a receiver is appointed over the assets of the Customer;
- (j) a creditor or encumbrancer of the Customer attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the Customer's assets and such attachment or process is not discharged within 14 days;
- (k) any event occurs, or proceeding is taken, with respect to the Customer in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 15.1(d) to clause 15.1(j) (inclusive);
- (l) there is a change of control of the Customer (within the meaning of section 1124 of the Corporation Tax Act 2010).

15.2 Notwithstanding clause 15.1, either party may terminate the Contract by giving to the other 30 days' prior written notice.

15.3 Any provision of this agreement that expressly or by implication is intended to come into or continue in force on or after termination or expiry of this agreement shall remain in full force and effect.

15.4 Termination of this agreement shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination.

## **16. Consequences of termination**

### **16.1 On termination of the Contract:**

- (a) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Services and Goods supplied but for which no invoice has been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;
- (b) the Customer shall return any Deliverables or Goods which have not been fully paid for. If the Customer fails to do so, then the Supplier may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with this Contract.

## **17. Force majeure**

- 17.1 The Supplier shall not in any circumstances have any liability to the Customer under the Contract if it is prevented from, or delayed in, performing its obligations under the Contract or from carrying on its business by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors.

## **18. Waiver**

- 18.1 No failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

## **19. Rights and remedies**

- 19.1 Except as expressly provided in this agreement, the rights and remedies provided under this agreement are in addition to, and not exclusive of, any rights or remedies provided by law.



## **20. Severance**

- 20.1 If any provision or part-provision of this agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this agreement.
- 20.2 If any provision or part-provision of this agreement is deemed deleted under clause 20.1, the parties shall negotiate in good faith to amend such provision that, , to the greatest extent possible, achieves the intended commercial result of the original provision.

## **21. Entire agreement**

- 21.1 This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- 21.2 Each party acknowledges that in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement.
- 21.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

## **22. Assignment**

- 22.1 The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, sub-contract, delegate, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.
- 22.2 The Supplier may at any time assign, transfer, charge, sub-contract, delegate, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.

## **23. No partnership or agency**

- 23.1 Nothing in the Contract is intended to or shall operate to create a partnership between the parties, or to authorise either party to act as agent for the other, and neither party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way (including without limitation the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

## **24. Third party rights**

- 24.1 This agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

## **25. Notices**

- 25.1 Any notice or other communication given to a party under or in connection with this contract shall be in writing and shall be:

- (a) delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office; or
- (b) sent by fax to its main fax number.

- 25.2 Any notice or communication shall be deemed to have been received:

- (a) if delivered by hand, on signature of a delivery receipt or at the time the notice is left at the proper address;
- (b) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Business Day after posting or at the time recorded by the delivery service;
- (c) if sent by fax, at 9.00 am on the next Business Day after transmission.

- 25.3 This condition does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution. For the purposes of this condition, "writing" shall not include email.

## **26. Governing law**

- 26.1 The Contract and any disputes or claims arising out of or in connection with it or its subject matter or formation (including without limitation non-contractual disputes or claims) are governed by and construed in accordance with the law of England and Wales.

## **27. Jurisdiction**

- 27.1 Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).