

Terms and Conditions of Sale

1. Interpretation

1.1 In these conditions:

“**Company**” means “Penguin Factory Limited”, a company incorporated in Scotland, (Registered Number “SC2701171”) and having its registered office at

c/o Sinclair Wood and Co.
90 Mitchell Street,
Glasgow.
G1 3NQ.

“**Customer**” means the person who accepts Goods and/or Services from the Company or whose order for the provision of Goods and/or Services is accepted by the Company;

“**Goods**” means hardware and software which the Company is to supply to the Customer in accordance with these terms and conditions;

“**Services**” means consultancy services which the Company supplies in relation to the Goods in accordance with these terms and conditions.

1.2 Any reference in these terms and conditions to any statute or statutory provision shall, unless the context otherwise requires, be construed as a reference to that statute or statutory provision as from time to time amended, consolidated, modified, extended, re-enacted or replaced.

1.3 In these terms and conditions references to the masculine includes the feminine and the neuter and to the singular includes the plural and vice Versa as the context admits or requires.

1.4 In these terms and conditions, headings will not affect the construction of the terms and conditions.

2. Application of these Terms and Conditions

2.1 These Terms and Conditions shall apply to any agreement for the purchase of Goods and/or Services between the Company and the Customer, to the exclusion of all other terms and conditions.

2.2 These terms and conditions shall apply to all sales of Goods and/or Services by the Company and any variation to these conditions and any representation about the Goods and/or Services shall have not effect unless expressly agreed in writing and signed on behalf of the Company. The Customer acknowledges that it has not relied on any statement, promise or representation made or given on behalf of the Company which is not set out in these terms and conditions.

3. Basis of sale of Goods and/or Services

3.1 The Company shall sell and the Customer shall purchase the Goods in accordance with any written quotation of the Company which is accepted by the Customer or any written order of the Customer which is accepted by the Company.

3.2 The quantity and description of the Goods shall be as set out in the Company’s quotation or acknowledgement of order.

3.3 The Company shall provide and the Customer accepts the Services in accordance with any written quotation of the Company which is accepted by the Customer or any written order of the Customer which is accepted by the Company. Declaring for the avoidance of doubt that the Company, shall, in its sole discretion be entitled to refuse to perform the Services, if in its opinion, the Company has failed to operate the Goods in accordance with the procedures and instructions set out in the operating guidelines provided to the Customer by the Company. In such event, the Customer shall be responsible for any repair and maintenance costs and the Company shall have no obligation to perform the Services.

3.4 The Company’s employees or agents are not authorised to make any representation concerning the Goods and/or Services unless confirmed by the Company in writing. In entering into this agreement, the Customer acknowledges that it does not rely on any representation which is not so confirmed.

3.5 Any advice or recommendation given by the Company or its employees or agents as to the storage, application or use of the Goods which is not confirmed in the operating guidelines or in writing by the Company, is followed or acted upon entirely at the Customer’s own risk and the Company shall not be liable for any such advice or recommendation which is not so confirmed, nor shall it be obliged to supply the Services.

4. Orders and Specification

4.1 No order submitted by the Customer shall be deemed to be accepted by the Company unless confirmed in writing by the Company’s authorised representative.

4.2 The Customer shall be responsible for ensuring the accuracy of the terms of any order submitted by the Customer and for giving the Company any necessary information relating to the Goods and/or Services within a sufficient time to enable the Company to provide the Goods and/or Services in accordance with its terms.

- 4.3 The quality and description of and any specification for the Goods and/or Services shall be those set out in the Company's quotation (if accepted by the Customer) or the Customer's order (if accepted by the Company).
- 4.4 The Company reserves the right to make any changes to the specification of the Goods which are required to conform with any applicable statutory or EC requirements or, where the Goods are to be supplied to the Company's specification, which do not materially affect their quality or performance.
- 4.5 The Company reserves the right to make any changes in connection with the supply of the Services or to withhold performance of the Services in the event that the Services are required due to a failure on the part of the Customer to operate the Goods in accordance with the operating guidelines.
- 4.6 No order which has been accepted by the Company may be cancelled by the Customer except by agreement in writing by the Company and on terms that the Customer shall indemnify the Company in full against all loss (including loss of profit), costs (including the cost of labour and material used), damages, charges and expenses incurred by the Company as a result of such cancellation.

5. Price

- 5.1 The price of the Goods and/or Services shall be the Company's quoted price as set out in the quotation or acknowledgement of order. All prices quoted are valid for 30 days only or until earlier acceptance by the Customer, after which they may be altered by the Company without giving notice to the Customer.
- 5.2 The Company reserves the right, by giving notice to the Customer at any time before delivery, to increase the price of the Goods, or at any time before the provision of the Services, to increase the price in connection with the Services, to reflect any increase in the cost to the Company which is due to any factor beyond the control of the Company (such as, without limitation, significant increases in the cost of labour, materials or other costs of manufacture), any change in delivery dates, (where applicable) quantities or specifications for the Goods or specification of the Services which is requested by the Customer, or any delay caused by any instruction of the Customer or failure of the Customer to give the Company adequate instructions or information.
- 5.3 In respect of any purchase of Goods and/or Services, the price of the Goods and/or Services shall be exclusive of VAT and all costs, or charges in relation to packaging, loading, unloading, carriage and insurance all of which amounts the Customer shall pay in addition when it is due to pay for the Goods and/or Services.

6. Payment

- 6.1 Payment shall be made by the Customer against invoices issued by the Company and shall be payable by the Customer on or at any time after delivery of the Goods, unless the Customer wrongfully fails to take delivery of the Goods in which event the Company shall be entitled to invoice the Customer for the price at any time after the Company has notified the Customer that the Goods are ready for collection or (as the case may be) the Company has tendered delivery of the Goods.
- 6.2 In the case of the supply of Services and subject to any special terms agreed in writing by the Customer and the Company, payment shall be made against invoices issued by the Company and shall be payable by the Customer in terms of clause 6.3.
- 6.3 The Customer shall make full payment of the invoice, in cleared funds, within 30 days of the date of the Company's invoice. The time for payment of the price is the essence of the agreement. Receipts for payment will only be issued on request.
- 6.4 If the Customer fails to make any payment on the due date, then without prejudice to the other right or remedy available to the Company, the Company shall be entitled to:
 - 6.4.1 cancel the order or suspend any further deliveries to the Customer and/or withhold performance of any Services until payment of any outstanding sum has been paid; and
 - 6.4.2 charge the Customer interest (both before and after any judgement) at the rate of 4% per annum above Bank of Scotland base rate from time to time until payment in full is made (a part of a month being treated as a full month for the purpose of calculating interest).
- 6.5 All payments payable to the Company under this agreement shall become immediately due upon termination of this agreement, despite any other provision.

7. Delivery of Goods

- 7.1 Delivery of the Goods shall be made by the Company.
- 7.2 All dates quoted for delivery are approximate only and the Company shall not be liable for any delay in delivery of the Goods however caused. Time for delivery shall not be the essence. The Goods may be delivered by the Company in advance of the quoted delivery date upon giving reasonable notice to the Customer.
- 7.3 If the Company fails to deliver the Goods for any reason other than any cause beyond the Company's reasonable control or the Customer's fault, and accordingly the Company is liable to the Customer, the Company's liability shall be limited to the excess (if any) of the cost to the Customer (in the cheapest available market) of similar goods to replace those not delivered over the price of the Goods.

7.4 If the Customer fails to take delivery of the Goods or fails to give the Company adequate delivery instructions at the time stated for delivery (otherwise than by reason of any cause beyond the Customer's reasonable control or by reason of the Company's fault) then without prejudice to any other right or remedy available to the Company, the Company may:

7.4.1 store the Goods until actual delivery and charge the Customer for the reasonable costs (including insurance) or storage; or

7.4.2 sell the Goods at the best price readily obtainable and (after deducting all reasonable storage and selling expenses) account to the Customer for the excess over the price under the contract or charge the Customer for any shortfall below the price under the Contract.

8. Supply of Services

8.1 Supply of Services shall be provided by the Company at an address specified by the Customer.

8.2 Any dates quoted for the supply of Services are approximate only and the Company shall not be liable for any delay in the supply of Services howsoever caused. Time shall not be of the essence.

8.3 If the Company fails to provide the Services for any reason, other than any reason beyond the reasonable control of the Company, or for the reason specified in clause 3.3, or due to a fault of the Customer, the Company's liability shall be limited to the excess (if any) of the cost to the Customer (in the cheapest available market) of the supply of similar services to replace those not supplied over the price of the Services.

9. Risk and Property in the Goods

9.1 Risk of damage or loss of the Goods shall pass to the Customer at the time of delivery, or if the Customer wrongly fails to take delivery of the Goods, the time when the Company has tendered delivery of the Goods.

9.2 Notwithstanding delivery and the passing of risk in the Goods or any other provision of these terms and conditions, title in the Goods shall not pass to the Customer until the Company has received in cash or cleared funds payment in full for the price of the Goods and all other goods agreed to be sold to the Customer for which payment is then due.

9.3 Until such time as title in the Goods pass to the Customer, the Customer shall keep the Goods separate from those of the Customer and third parties and properly stored, protected and insured and identified as the Company's property.

9.4 Until such time as title in the Goods passes to the Customer (and provided the Goods are still in existence and have not been resold) the Company shall be entitled at any time to require the Customer to deliver up the Goods to the Company and if the Customer fails to do so forthwith, to enter upon any premises of the Customer or any third party where the Goods are stored and repossess the Goods.

9.5 The Customer shall not be entitled to pledge or in any way charge by way of security for any indebtedness of the Goods which remain the property of the Company but if the Customer does so all moneys owing by the Customer to the Company shall (without prejudice to any other right or remedy of the Company) forthwith become due and payable.

10. Warranties and Liability

10.1 Subject to the conditions set out below the Company warrants that the Goods will correspond with their specification at the time of delivery and will be free from defects in material and workmanship.

10.2 Subject to the conditions set out below, the Company warrants that the Services will reach the standards expected of a reasonable and prudent maintenance engineer.

10.3 The above warranty is given by the Company subject to the following conditions:

10.3.1 the Company shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions failure to follow the Company's instructions (whether oral or in writing and including but not limited to the type of product used in connection with the Goods), misuse or alteration or repair of the Goods without the Company's approval.

10.3.2 the Company shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price for the Goods and/or the Services has not been paid by the due date for payment.

10.3.3 The above warranty does not extend to parts, materials or equipment not manufactured by the Company, in respect of which the Customer shall only be entitled to the benefit of any such warranty or guarantee as us given by the manufacturer to the Company.

10.4 Subject as expressly provided in these Conditions, and except where the Goods and/or Services are sold to a person dealing as a consumer (within the meaning of the Unfair Contract Terms Act 1977), all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

10.5 Where Goods are sold under a consumer transaction (as defined by the Consumer Transactions (Restrictions or Statements) Order 1976) the statutory rights of the Customer are not affected by these Conditions.

- 10.6 Any claim by the Customer which is based on any defect in the quality or condition of the goods or their failure to correspond with specification shall (whether or not delivery is refused by the Customer) be notified to the Company within 7 days from the date of delivery or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure. If delivery is not refused, and the Customer does not notify the Company accordingly, the Customer shall not be entitled to reject the Goods and the Company shall have no liability for such defect or failure, and the Customer shall be bound to pay the price as if the Goods had been delivered in accordance with the Contract.
- 10.7 Where any valid claim in respect of any of the Goods which is based on any defect in the quality or condition of the Goods or their failure to meet specification is notified to the Company in accordance with these Conditions, the Company shall be entitled to replace the Goods (or the part in question) free of charge or, at the Company's sole discretion, refund to the Customer the price of the Goods (or a proportionate part of the price), but the Company shall have no further liability to the Customer.
- 10.8 Where any valid claim in respect of the Services which is based on any defect in the quality of the provision of the Services is notified to the Company in accordance with these Conditions, the Company shall be entitled to provide alternative services free of charge or, at the Company's sole discretion, refund to the Customer the cost of the Services (or a proportionate part of their price), but the company shall have no further liability to the Customer.
- 10.9 Except in respect of death or personal injury caused by the Company's negligence, the Company shall not be liable to the Customer by reason of any representation (unless fraudulent), or any implied warranty, condition or other term, or any duty at common law, or under the express terms of the Contract for any indirect, special or consequential loss or damage (whether for loss or profit or otherwise), costs, expenses or other claims for compensation whatsoever (whether caused by the negligence of the Company, its employees or agents or otherwise) which arise out of or in connection with the supply of the Goods and/or Services or their use by the Customer, and the entire liability of the Company under or in connection with the Contract shall not exceed the price of the Goods and/or Services, except as expressly provided in these Conditions.
- 10.10 The Company shall not be liable to the Customer or be deemed to be in breach of the Contract by reason of any delay in performing or any failure to perform, any of the Company's obligations in relation to the Goods and/or Services, if the delay or failure was due to any cause beyond the Company's reasonable control. Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond the Company's reasonable control:
- 10.10.1 Act of God, explosion, flood, tempest, fire or accident;
 - 10.10.2 war or threat of war, sabotage, insurrection, civil disturbance or requisition;
 - 10.10.3 acts, restrictions, regulations, bye-laws, prohibitions or measures of any kind on the part of the governmental, parliamentary or local authority;
 - 10.10.4 strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Company or of a third party);
 - 10.10.5 difficulties in obtaining raw materials, labour, fuel, parts or machinery; and
 - 10.10.6 power failure or breakdown in machinery.
 - 10.10.7 Acts or threat of terrorism.

11. Indemnity

- 11.1 The Customer shall indemnify the Company against all claims which may be made against the Company and costs incurred by the Company arising from any claim made against the Company arising in connection with this Contract and this indemnity shall extend to and shall include all costs and expenses reasonably incurred by the Company in investigating and/or defending any such claim provided that:
- 11.1.1 the Company is given full control of any proceedings or negotiations in connection with any such claim;
 - 11.1.2 the Customer shall give the Company all reasonable assistance for the purpose of any such proceedings or negotiations;
 - 11.1.3 except pursuant to a final award, the Customer shall not pay or accept any such claim, or compromise any such proceedings without the consent of the Company (which shall not be unreasonably withheld);
 - 11.1.4 the Customer shall do nothing which would or might vitiate any policy of insurance or insurance cover which the Customer may have in relation to such infringement, and this indemnity shall not apply to the extent that the Customer recovers any sums under any such policy or cover (which the Customer shall use its best endeavours to do);
 - 11.1.5 the Company shall be entitled to the benefit of, and the Customer shall accordingly account to the Company for, all damages and costs (if any) awarded in favour of the Customer which are payable

by, or agreed with the consent of the Customer (which consent shall not be unreasonably withheld) to be paid by, any other party in respect of any such claim; and

- 11.1.6 without prejudice to any duty of the Customer at common law, the Company shall be entitled to require the Customer to take such steps as the Company may reasonably require to mitigate or reduce any such loss, damages, costs or expenses for which the Company is liable to indemnify the Customer under this clause.

12. Insolvency of Customer

12.1 This clause applies if:

- 12.1.1 the Customer makes any voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) becomes subject to an administration order or goes into liquidation (otherwise than for the purposes of amalgamation or reconstruction); or
- 12.1.2 an encumbrancer takes possession, or a receiver is appointed, of any of the property or assets of the Customer; or
- 12.1.3 the Customer ceases, or threatens to cease, to carry on business; or
- 12.1.4 the Company reasonably apprehends that any of the events mentioned above is about to occur in relation to the Customer and notifies the Customer accordingly.

12.2 If this clause applies then, without prejudice to any other right or remedy available to the Company, the Company shall be entitled to cancel the Contract or suspend any further deliveries under the Contract without any liability to the Customer, and if the Goods have been delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

13. General

- 13.1 Any notice required or permitted to be given by either party to the other under these Conditions shall be in Writing addressed to that other party at its registered office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice.
- 13.2 No waiver by the Company of any breach of the Contract by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provision.
- 13.3 If any provision of these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provision of these Conditions and the remainder of the provision in question shall not be affected.
- 13.4 Any dispute arising under or in connection with these Conditions or the sale of the goods shall be referred to the decision of an expert, who shall act as expert and not as arbiter, to be appointed by agreement or (in default) nominated on the application of either party by the President for the time being of the Institute of Chartered Accountants of Scotland and whose decision (including any decision as to his costs) shall be final.
- 13.5 The Company is entitled to sub-contract any of its obligations under this Contract.
- 13.6 The Customer is not entitled to assign or sub-contract any of its rights or obligations under this Contract without the prior written consent of the Company.
- 13.7 The Contract shall be governed by the law of Scotland, and the Customer agrees to submit to the non-exclusive jurisdiction of the Scottish courts.