

# Terms and Conditions

## 1. DEFINITIONS

- 1.1 "The Goods" means one copy of each of the Program(s) in the medium chosen by the Seller as the most appropriate and one copy of all relevant operating documents and the Hardware and Services listed overleaf (if any).
- 1.2 "Updates" means the periodic supply of program upgrades and, where appropriate, manufacturer's pricing information using media agreed with the seller.
- 1.3 "Contract Amount" means any or all of the price of the fees for Program Licence(s), fees for Support & Updates, fees for agreed Additional Services, any equipment supplied and any other charges payable under this Contract.
- 1.4 "Licence" or "Licences" means in respect of each of the Programs the licences granted pursuant to clause 9.
- 1.5 "Date of delivery" means the date on which the Goods have been received by the Buyer

## 2. CONTRACT AMOUNT

- 2.1 The Price includes delivery to the Installation Address unless otherwise agreed.
- 2.2 The Price for the Goods is due in full on delivery (less any deposit paid on the signing of the Contract). The Licence Fees are payable in advance on delivery of the Goods. The Fees for Additional Services are payable on the first day of performance of the Additional Services. Contract Amount is due whether the Seller issues an invoice in respect of it or not.
- 2.3 If the Buyer shall fail to pay any of the Contract Amount when it is due, the Seller shall be entitled at its option:
  - a) to treat this Contract as redundant by the Buyer, or
  - b) to require the Buyer by notice in writing to pay interest on all sums outstanding at 4% above the base lending rate of HSBC Bank plc for the time being or at the Seller's option at the rate then allowed on the judgement debts; and/or
  - c) to withhold performance of all the Seller's obligations until all sums due including interest have been paid and when and if payment is made the Buyer shall not be entitled to any refund or credit in respect of the period of non-performance.
- 2.4 The Seller reserves the right to vary any recurring charges on giving to the Buyer 30 days notice in writing, provided that such variation is not made more than once a year.
- 2.5 Without limiting the generality of clause 2.3 in the event that the Buyer fails to pay any sum properly due to the Seller and any such sum remains due for a period exceeding 7 days, the Seller reserves the right to give seven days written notice of its intention to render the Programs inoperable either remotely or by activation of any immobilisation mechanism contained within the Programs if payment remains outstanding at the end of such period. If the Buyer fails to comply with such notice the Seller shall be entitled to render the Programs inoperable by such of the above means as it deems appropriate. Upon payment of any sum due the Seller undertakes to be liable for any loss or damage including, but without prejudice to the generality of the foregoing any loss or data profits business anticipated savings or other indirect or consequential loss whatsoever.

## 3. DELIVERY

- 3.1 The Seller will deliver the Goods to the Installation Address quoted on the face of the Contract.

## 4. INSTALLATION ACCESS AND ACCEPTANCE

- 4.1 The Buyer including the Installation Address cabling personnel and environment shall be reasonably prepared for installation and/or delivery.
- 4.2 The Goods shall be deemed to have been accepted upon the receipt of the software
- 4.3 Should the Seller or any of its agents or employees have access the Computer System from time to time for the purpose of carrying out its obligations under this Contract the Seller shall not be liable for any loss or damage including but without prejudice to the

generality of the foregoing any loss of data, profits, business anticipated savings or other indirect or consequential loss whatsoever.

#### 5. DELAY IN PERFORMANCE OF OBLIGATIONS

5.1 Any date quoted by the Seller for the performance of its obligations under the Contract is given in good faith as a reasonable estimate, but time for the performance of such obligations is not of the essence of the Contract.

#### 6. CHANGE IN LAW ETC

6.1 If after the date of this Contract as a result of any change in the law of the UK or in any directive or regulation having the force of law in the UK or any relevant part of it the cost to the Seller of the performance of its obligations shall be increased or reduced then the Seller shall give notice to the Buyer of the relevant facts and the Price and/or other Contract Amount shall be increased or reduced by the amounts stated in such notice and which shall reasonably reflect the increase or reduction in cost as the case may be.

#### 7. VARIATIONS IN GOODS ETC

7.1 If a Program(s) is included in the Goods supplied under this Contract and if for reasons beyond the Seller's control it is necessary to replace that Program(s) then the Seller reserves the right to supply in place of the Program(s) a substitute provided that the substitute shall be not less efficient or fit for the Buyer's purposes than the Program(s).

#### 8. LICENCE(S)

8.1 Under this Contract the Buyer is granted in respect of the Programs a separate and several Licence to use it for the purpose and under the terms of this Contract in the Buyer's named business activities but not for the provision to any third party or bureau services. If the Buyer should wish to use any Program other than with the Hardware then it is required to obtain a fresh licence from the Seller for the purpose. If the Buyer should wish to have in respect of any of the Programs more concurrent users than the number stated in the Contract then it shall so inform the Seller and shall be entitled upon payment of a Licence Fee at the Seller's standard rate then ruling to be granted a fresh Licence for the purpose.

8.2 Each Licence granted under this Contract is non-transferable and non-exclusive and the Buyer has no right to grant any sub-licence.

8.3 Each Program and all copyright patent trade mark and other intellectual property rights in it remains the property of the Seller or its licensor and except as provided in this clause 8 the Buyer shall acquire no rights in respect of any of the Programs nor may the Buyer in any circumstances take any copies of any of the Programs.

8.4 The Buyer shall comply with all reasonable instructions of the Seller as to the use of the Programs and as to the identification of them by trade marks or otherwise as being the property of the Seller or its licensor and the Buyer shall permit the Seller access to the Buyer's premises at all reasonable times to audit the use of the Programs.

8.5 The Buyer shall take only so many back-ups of each Program as is reasonably necessary for operational and security purposes and will take all such steps as a prudent owner would take in respect of his own property or as are reasonably directed by the Seller to ensure that:-  
no Program or part of a Program or operating document or copy of any of them is obtained or used by any unauthorised party; and the risk of loss flowing from any fault in or failure of the Goods is minimised. Back-ups should in particular be kept in a secure fire-proof environment and a register of all such copies be maintained as evidence of compliance with the Buyer's obligations under this Agreement. The Buyer should be aware that this Agreement does not encompass disaster recovery services unless contracted specifically overleaf.

8.6 In particular, without limiting the generality of the foregoing, the Buyer shall not by itself nor by any other person modify or adapt the Programs or incorporate the Programs in software not provided by the Seller. If the Buyer does modify or adapt the Programs in breach of this provision such action shall not affect any of the Buyer's duties and obligations under the Contract and in particular such copied adapted or modified software shall be subject to the terms of the Contract.

- 8.7 The Buyer is not permitted under the terms of the Contract to decompile the Programs. The Seller does not warrant that the Programs will be interoperable with other software.
- 8.8 If the Buyer is in breach of any of the sub-clauses 8.1 to 8.7 inclusive the Seller may at its option by notice in writing terminate any or all of the Licences granted under this Contract. In the event of termination of all Licences the provisions of clause 25 shall apply.
- 8.9 Within two weeks of the termination of any of the Licence(s) granted under this Contract or of the Contract generally the Buyer shall either and at the Seller's option:
- return to the Seller keeping no copies the Program(s) and all operating documents and other literature to which the Licence(s) related; or
  - destroy the Program(s) and all operating documents and other literature to which the Licence(s) related and provide the Seller with a statement in writing and signed by the Buyer's authorised representative that this has been done.
- 8.10 If the Buyer fails to comply with either clause 8.9.a or 8.9.b the Buyer hereby licences the Seller its employees and agents to enter the premises of the Buyer for the purpose of either recovering the Programs all copies thereof and all operating documents and other literature to which the Licence(s) relates or destroying the same.
- 8.11 While the Licence(s) remains in force or if the Contract is terminated then for six months thereafter after the date of the Contract neither party shall offer to any employee of the other party with whom it has had contact in connection with the Contract employment or any engagement to provide services whether on his/her own account or as the partner proprietor director employee or agent of any other person firm or company.
- 8.12 The Licence(s) shall subsist only so long as all Contract Amount are paid up to date and if a Licence is terminated for any reason the Buyer is not entitled to any refund of Licence Fee, Maintenance Fees and Update Fees or any part of them in respect of the part year following such termination.

## 9. THIRD PARTY INTELLECTUAL PROPERTY RIGHTS

- 9.1 The Seller indemnifies the Buyer against any liability to any third party for actions claims demands damages costs or expenses arising out of the infringement of any patent trade mark registered design copyright or other intellectual property rights in force in the UK at the date of this Contract by the authorised and normal use of the Goods in accordance with this Contract provided that this indemnity shall not apply to any infringement which:
- is due to the use of the Goods in conjunction with goods and/or Programs not supplied under this Contract or another Contract between the same parties; or
  - arises as a result of a breach by the Buyer of its obligations under this Contract.
- 9.2 It is a condition of the indemnity given by this clause 10 that the Buyer shall promptly notify the Seller in writing with all reasonable details of any matter within this clause and shall make no concession or admission in respect of such matter without the written authority of the Seller and shall permit the Seller or its licensor to conduct at the Seller's or licensor's expense the defence of or negotiations as to any such matter and shall co-operate fully with the Seller or licensor for the purpose of such defence and/or negotiations.
- 9.3 Copyright of any supplier pricing data supplied by Kudos on behalf of any manufacturer or Supplier shall remain with the Supplier. The buyer shall not copy, or reproduce any such data, or in any way pass it to a third party without the specific written permission of the Supplier. The Buyer shall indemnify the Seller for any losses arising to the Seller as a consequence of a breach of this clause.

## 10. PERFORMANCE FAULTS AND DEFECTS

- 10.1 Any statement made by or on behalf of the Seller as to the anticipated performance of the Goods is made in good faith on the basis of test data and field experience but does not form any part of this Contract since performance depends upon the Buyer's internal systems and other matters beyond the Seller's and no guarantee can be given that any particular performance level will be achieved. If any statement has been made by or on behalf of the Seller orally or in writing about the anticipated performance of the Goods upon which the Buyer relies in making this Contract the Buyer must cause it to be recoded in writing upon the face

of this Contract and acknowledges that if it does not do so then any such statement did not induce it to contract.

- 10.2 The Seller warrants that the Goods are reasonably fit for the purpose made known to the Seller in writing on the face of this Contract but subject to 10.1 above all other warranties and conditions as to the quality of the Goods or their ability to perform certain functions are expressly excluded from the Contract. If the Buyer shall discover any fault in a Program it shall promptly so notify the Seller and the Seller shall investigate and use reasonable efforts to provide a solution which may take the form of a software update or an alternative such as a temporary correction or method of temporarily circumventing the problem or the provision under 7.2 above of modified or replacement Programs.
- 10.3 If the Seller shall be in breach of any term of this Contract so that but for this provision the Buyer would be entitled to reject the Goods or any part of them the Seller shall be entitled at its option:

to provide replacements for the Goods or part of them as the case may be; or

to remedy the breach and to furnish the Buyer with temporary replacement Goods as the case may be and if the Seller elects for either of these options and acts upon it reasonably quickly then the Buyer shall have no right of rejection or other remedy for the breach.

- 10.4 If the Buyer shall be in breach of any term of this Contract the Seller shall be entitled to withhold performance of any or all of its obligations under this Contract until such breach is remedied and when and if such breach is remedied the Buyer shall not be entitled to refund or credit in respect of the period of breach.

## 11. BUYER'S OBLIGATIONS

The Buyer shall:

- 11.1 Take all reasonable steps to preserve and protect the Goods;
- 11.2 Follow all advice and directions given by the Seller in any operating documents or other literature relating to the proper operation and use of the Goods.
- 11.3 Use only good quality consumables in connection with the Goods in accordance with the manufacturers recommendations from time to time;
- 11.4 Replace any peripherals connected to or used in connection with the Goods in accordance with manufacturers recommendations as to usage;
- 11.5 In circumstances in which the Buyer proposes to-  
connect third party supplied hardware or peripherals to the Goods; or  
use third party supplied media or software in association with the Programs  
before doing so obtain confirmation from the Seller in writing that such items are compatible with the operation of the Goods.

## 12. SOFTWARE SUPPORT SERVICES

The Support to be provided by the Seller under this Contract shall be limited to the diagnosis or repair of faulty components within the Goods

- 12.1 The Seller will provide Support by telephone during normal office hours of 0900 -1730 daily, not including weekends and bank holidays.
- 12.2 The Seller does not warrant that the Goods will be operational whilst carrying out Support but will use its best endeavours to do so.
- 12.3 The buyer shall purchase and install the most current version of PC Anywhere software for system maintenance and support.

## 13. EXCLUSIONS FROM SOFTWARE SUPPORT

13.1 The following works are excluded from Software Support:-

Works arising out of the failure of the Buyer to comply with literature, supplied instructions or recommendations given by the Seller.

Works arising out of neglect, misuse or abuse of or wilful or accidental damage to the Goods other than by the Seller.

Works arising out of the failure or intermittent operation or inadequacy of electrical power supply.

Works caused by or attributed to operator error or training issues.

Works caused by failure of the Buyer to comply with clause 11.

Maintenance of any Program the latest release of which has not been installed by the Buyer.

#### 14. CONFIDENTIALITY

14.1 The operating documentation, object codes and other material ideas, expressions or information relating to or forming part of the Programs is confidential and the property of the Seller. The Buyer agrees to keep all such information together with any information relating to the Seller's business, secret and confidential unless such information is in the public domain other than through breach of the Contract and to respect the Seller's proprietary rights in all such information, disclosing it only to those employees or agents to whom disclosure is necessary for the Seller to obtain the benefit of this Contract. The Buyer shall ensure that all such employees are bound by obligations of confidentiality in writing so as to enable the Buyer to comply with the terms of this clause 14.

14.2 If the Buyer becomes aware that any of its employees and/or any other unauthorised party has obtained any Program or part of a Program or operating documents or a copy of any of them it shall forthwith so inform the Seller and take at the Buyer's cost all such steps as are reasonably necessary including the issue of proceedings and application for injunctions in order to enable it to comply with the terms of this clause 14 or mitigate the loss from its failure to do so.

14.3 The Seller acknowledges that in performing its obligations under the Contract it and its employees or agents will have access to confidential information belonging to the Buyer. The Seller undertakes not to make use of such confidential information or disclose it to any party other than as required in order to perform its obligations under the Contract unless such information is in the public domain other than through breach of the Contract. The Seller also undertakes to instruct its employees not to use or disclose such confidential information save as set out above.

#### 15. DATA TRANSFER

15.1 If the Seller undertakes to perform Data Transfer as indicated :-

The Buyer and the Seller will identify the extent manner and format of the data to be transferred in advance;

The Seller will confirm the same to the Buyer in writing;

The Buyer will co-operate with the Seller to ensure the cost-effective and efficient transfer of such data.

15.2 The Seller's liability for the performance of its obligations in relation to Data Transfer shall be limited to the restoration of the data agreed to be transferred to the Computer System. The Seller shall not be liable for any other loss or damage (whether direct or indirect) in relation to the Data Transfer including but without prejudice to the generality of the foregoing any loss of data profits business, anticipated savings or consequential loss whatsoever. The Seller shall not in any event be responsible for the selection of the data to be transferred.

#### 16. TERMINATION

16.1 Either party shall be entitled by notice in writing to the other to terminate this Contract:-

If the other shall commit or allow to be committed any material breach of the terms of this Contract and if such breach being capable of remedy shall not be so remedied within thirty days of notice thereof; or

At any time after the expiry of one year from the Date of Delivery that party serves a notice of termination of not less than three months.

16.2 If either party to this Contract shall become insolvent or commence to be wound up (other than by member's voluntary winding up for the purpose only of amalgamation or reconstruction) or have appointed to it or any of its assets a receiver then the other party may at its option;

Terminate the Contract by giving notice in writing to the other party or to any liquidator receiver or person in whom the other party's interest under the Contract has been vested; or

Offer the liquidator receiver or other person in whom the other party's interest under the Contract has become vested the opportunity of assuming the benefit and burden of the Contract subject to his providing to the reasonable satisfaction of the party giving notice a guarantee or other form of assurance of the due performance of the obligations under the Contract.

16.3 Termination of this Contract shall be without prejudice to

Any right, remedy or obligation of either party which has accrued before such termination; and

The coming into force of any provision hereof which is expressly intended to come into or continue in force on or after such termination being for the avoidance of doubt clauses 16 (confidentiality), 9.9 and 9.10 (Cessation of use and/or Surrender of Programs) and 9.11 (non-solicitation).

16.4 Except as provided in this Contract neither party may terminate it. If the Buyer purports to cancel this Contract the Seller may in its discretion agree to the termination of the Contract subject to the payment by the Buyer of a cancellation charge to be notified by the Seller which shall represent the loss to the Seller of the profit which it could have reasonably expected to earn on the Contract.

## 17. LIMITATION OF LIABILITY

17.1 Except as expressly provided at clauses 9.1, 10.2 and 17.4 the Seller shall be under no duty of care to the Buyer in tort contract, statutory duty or otherwise and for the avoidance of doubt it is recorded that the Seller is not engaged in providing general consultancy services to its customers and accepts no responsibility for any loss which the Buyer may sustain as a result of its acting on any advice given or opinion expressed by the Seller or its employees.

17.2 While the Seller takes every reasonable care to ensure the quality of the Programs it is impossible to eliminate the risk that computer software may develop faults or viruses or in unforeseen circumstances perform in a manner not anticipated by the Seller of it.

17.3 The Seller shall not in any circumstance be liable whether in contract tort or otherwise for any indirect or consequential loss or damage howsoever arising and of whatsoever nature suffered or incurred by the Buyer or any third party in relation to matters contained within this Contract including (without limitation) loss of profits, loss of contracts, loss of data, loss of operational time or loss of use of any equipment or process suffered either directly or indirectly by the Buyer or any third party or any loss of any anticipated earnings or savings.

17.4 Without prejudice to the remainder of this clause 17 and to clause 10 above the liability of the Seller for damage to the tangible property of the Buyer due to the negligence of the Seller or for any breach of this Contract shall be limited to the lesser of:-  
Four times the Price of the Goods and the Software Support fees in the year in which the breach occurred; or  
£15,000.

17.5 Where under this Contract any substitute Programs are provided by the Seller under clauses 7.1 and 7.2 this Contract shall with such modifications only as the sense requires apply to them as to the Programs as the case may be.

## 18. PERFORMANCE OF SERVICES

18.1 To the extent that the Seller undertakes to supply Software Support Services or Additional Services or any other services under the Contract the Seller warrants that it will carry out such services with reasonable care and skill but subject to clause 10.1 all other warranties and conditions as to the quality of such services are expressly excluded from the Contract.

## 19. ASSIGNMENT

19.1 The Buyer may not assign this Contract nor any of its rights or obligations under the Contract without the prior consent in writing of the Seller which shall not be unreasonably withheld.

20. FORCE MAJEURE

20.1 Neither party shall be liable for any failure to perform any of its obligations other than the payment of the Contract Amount under this Contract for a reason beyond its reasonable control such as for example strike or other industrial action, war, riot or civil disorder, fire, flood, lightning, earthquake or other natural eventuality or act of God or of State.

21. ENTIRE AGREEMENT AND EXCLUSIONS OF PREVIOUS REPRESENTATIONS

21.1 This Contract constitutes the whole of the agreement between the parties hereto relating to its subject matter and supersedes any previous agreement or arrangements between the parties.

22. SEVERANCE

22.1 Any provision of this Contract which is found to be invalid or unenforceable by a competent authority or court shall to the extent of such invalidity or unenforceability be deemed severable to this Contract and shall not affect the other provisions of this Contract which shall continue unaffected.

23. NOTICES

23.1 Any notice to be served under this Contract shall be in writing and may be served on the party to which it is addressed at its registered office address or in the case of a party other than the registered company its principal place of business either by delivering it or by posting it recorded delivery or by facsimile or telex.

24. AMENDMENT AND WAIVER

24.1 No amendment to this Contract shall bind the parties unless in writing and signed by the duly authorised representatives of both parties.

24.2 No failure by either party to enforce its rights or pursue any remedy under this Contract shall be taken to be a waiver of such rights or remedy.

25. PROPER LAW AND JURISDICTION

25.1 This Contract is governed by English Law and the parties submit to the non-exclusive jurisdiction of the English High Court.

26. DATA PROTECTION ACT 1984

26.1 Information held for our Customer administration/Marketing and Selling purposes may also be processed on behalf of third parties for their marketing and selling purposes.