

# Best Engineering Services Ltd

## Terms and Conditions of Sale

### 1. DEFINITIONS:

In these Terms and Conditions of Sale, "Seller" means Best Engineering Services Ltd; "Buyer" means the person, firm, company or corporation by whom the order is given; "Goods" means the goods (including any Software and Documentation, as defined in Clause 9) described in the Seller's Acknowledgement of Order form; "Services" means the services described in the Seller's Acknowledgement of Order Form; "Contract" means the written agreement (including these Terms and Conditions) made between the Buyer and the Seller for the supply of the Goods and/or provision of Services; "Contract Price" means the price payable to the Seller by the Buyer for the Goods and/or Services and "Seller Affiliate" means any company which is for the time being directly or indirectly controlled by the ultimate parent company of the Seller. For the purposes of this definition, a company is directly controlled by or is a subsidiary of another company or companies which holds 50% or more of the shares carrying the right to vote at a general meeting of the first mentioned company and a particular company is indirectly controlled by another company or companies if a series of companies can be specified, beginning with that company or those companies and ending with the particular company, so related that each company in the series is directly controlled by one or more of the companies earlier in the series.

### 2. THE CONTRACT:

2.1 All orders must be in writing and are accepted subject to these Terms and Conditions of Sale. No terms or conditions put forward by the Buyer and no representations, warranties, guarantees or other statements not contained in the Seller's quotation or Acknowledgement of Order nor otherwise expressly agreed in writing by the Seller shall be binding on the Seller.

2.2 The Contract shall become effective only upon the date of acceptance of the Buyer's order on the Seller's Acknowledgement of Order form or upon the date of fulfillment of all conditions precedent stipulated in the Contract, whichever is the later (the "Effective Date"). If the details of the Goods or Services described in the Seller's quotation differ from those set out in the Acknowledgement of Order Form the latter shall apply.

2.3 No alteration or variation to the Contract shall apply unless agreed in writing by both parties. However, the Seller reserves the right to effect minor modifications and/or improvements to the Goods before delivery provided that the performance of the Goods is not adversely affected and that neither the Contract price nor the delivery date is affected.

### 3. VALIDITY OF QUOTATION AND PRICES:

3.1 Unless previously withdrawn, the Seller's quotation is open for acceptance within the period stated therein or, when no period is so stated, within thirty days after its date.

3.2 Prices for delivery within the period stated in the Seller's quotation are exclusive of (a) Value Added Tax and (b) any similar and other taxes, duties, levies or other like charges arising outside the United Kingdom in connection with the performance of the Contract.

3.3 Prices are for Goods delivered EXW (Ex works) the Seller's shipping point, exclusive of freight, insurance and handling.

### 4. PAYMENT:

4.1 Payment shall be made: (a) in full without set-off, counterclaim or withholding of any kind (save where and to the extent that this cannot by law be excluded); and (b) in the currency of the Seller's quotation within thirty days of date of invoice unless otherwise specified by the Seller's Finance Department. Goods will be invoiced at any time after they have been despatched or immediately prior to despatch. Services will be invoiced monthly in arrears or, if earlier, upon completion. Without prejudice to the Seller's other rights, the Seller reserves the right to: (i) charge interest on any overdue sums at 4% above the base lending rate of HSBC Bank plc (or such higher rate stipulated by applicable law) during the period of delay; (ii) suspend performance of the Contract (including withholding shipment) in the event that the Buyer fails or in the Seller's reasonable opinion it appears that the Buyer is likely to fail to make payment when due under the Contract or any other contract; and (iii) at any time require such reasonable security for payment as the Seller may deem reasonable.

### 5. DELIVERY PERIOD:

5.1 Unless otherwise stated in the Seller's quotation, all periods stated for delivery or completion run from the Effective Date and are to be treated as estimates only not involving any contractual obligations.

5.2 If the Seller is delayed in or prevented from performing any of its obligations under the Contract due to the acts or omissions of the Buyer or its agents (including but not limited to failure to provide specifications and/or fully dimensioned working drawings and/or such other information as the Seller reasonably requires to proceed expeditiously with its obligations under the Contract), the delivery/completion period and the Contract price shall both be adjusted accordingly.

5.3 If delivery is delayed due to any act or omission of the Buyer, or if having been notified that the Goods are ready for despatch, the Buyer fails to take delivery or provide adequate shipping instructions, the Seller shall be entitled to place the Goods into a suitable store at the Buyer's expense. Upon placing the Goods into the store, delivery shall be deemed to be complete, risk in the Goods shall pass to the Buyer and the Buyer shall pay the Seller accordingly.

### 6. FORCE MAJEURE:

6.1 The Contract (other than the Buyer's obligation to pay all sums due to the Seller in accordance with the Contract) shall be suspended, without liability, in the event and to the extent that its performance is prevented or delayed due to any circumstance beyond the reasonable control of the party affected, including but not limited to: Act of God, war, armed conflict or terrorist attack, riot, fire, explosion, accident, flood, sabotage; governmental decisions or actions (including but not limited to prohibition of exports or re-exports or the failure to grant or the revocation of applicable export licenses), or labour trouble, strike, lockout or injunction. The Seller shall have no obligation to supply any hardware, software, services or technology unless and until it has received any necessary licences or authorisations or has qualified for general licences or licence exceptions under applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time (including without limitation those of the United States, the European Union and the jurisdiction in which the Seller is established or from which the items are supplied). If for any reason any such licenses, authorisations or approvals are denied or revoked, or if there is a change in any such applicable laws, regulations, orders or requirements that would prohibit the Seller from fulfilling the Contract, or would in the reasonable judgement of the Seller otherwise expose the Seller and/or the Seller's Affiliate(s) to a risk of liability under applicable laws, regulations, orders or requirements, the Seller shall be relieved without liability of all obligations under the Contract.

6.2 If either party is delayed or prevented from performance of its obligations by reason of this Clause for more than 180 consecutive calendar days, either party may terminate the then unperformed portion of the Contract by notice in writing given to the other party, without liability provided that the Buyer shall be obliged to pay the reasonable cost and expense of any work in progress and to pay for all Goods delivered and services performed as at the date of termination. The Seller may deliver by instalments and if so each delivery shall constitute a separate contract and failure by the Seller to deliver any one or more of the instalments in accordance with their terms shall not entitle the Buyer to terminate the whole Contract or treat it as repudiated.

### 7. DELIVERY, RISK & TITLE:

7.1 Unless otherwise expressly stated in the Contract, the Goods will be delivered Carriage Paid To (CPT) the destination named in the Contract; freight, packing and handling will be charged at the Seller's standard rates. Risk of loss of or damage to the Goods shall pass to the Buyer upon delivery as aforesaid and the Buyer shall be responsible for insurance of the Goods after risk has so passed. Alternatively, if it is expressly stated in the Contract that the Seller is responsible for the insurance of the Goods after their delivery to the carrier, such insurance will be charged at the Seller's standard rates. "Ex-works", "FCA", "CPT" and any other delivery terms used in the Contract shall be defined in accordance with the latest version of Incoterms.

7.2 Subject to Clause 9, title to the Goods shall pass to the Buyer upon delivery in accordance with Clause 8.1.

#### **8. DOCUMENTATION AND SOFTWARE:**

8.1 Title to and ownership of the copyrights in software and/or firmware incorporated into or provided for use with the Goods ("Software") and documentation supplied with the Goods ("Documentation") shall remain with the relevant Seller Affiliate (or such other party as may have supplied the Software and/or Documentation to the Seller) and is not transferred hereby to the Buyer.

8.2 Except as otherwise provided herein, the Buyer is hereby granted a non-exclusive, royalty-free licence to use the Software and Documentation in conjunction with the Goods, provided that and for so long as the Software and Documentation are not copied (unless expressly authorised by applicable law) and the Buyer holds the Software and Documentation in strict confidence and does not disclose them to others, or permit others to have access to them (other than the Seller's standard operating and maintenance manuals). The Buyer may transfer the foregoing licence to another party which purchases, rents or leases the Goods, provided the other party accepts and agrees in writing to be bound by the conditions of this Clause 9.

8.3 Notwithstanding Sub-clause 9.2, the Buyer's use of certain Software, (as specified by the Seller and including but not limited to control system and AMS Software) shall be governed exclusively by the applicable Seller Affiliate or third party licence agreement.

8.4 The Seller and its Affiliates shall retain ownership of all inventions, designs and processes made or evolved by them and save as set out in this Clause 9 no rights in intellectual property are hereby granted.

#### **9. DEFECTS AFTER DELIVERY:**

9.1 The Seller warrants (i) subject to the other provisions of the Contract, good title to and the unencumbered use of the Goods; (ii) that Goods manufactured by the Seller and/or the Seller's Affiliates shall conform with the Seller's specifications therefor and be free of defects in materials and workmanship and (iii) that Services provided by the Seller or the Seller's Affiliates will be performed with all reasonable skill, care and due diligence and in accordance with good engineering practice. The Seller will make good, by repair or at the Seller's option by the supply of a replacement part or parts, any defects which, under proper use, care and maintenance, appear in Goods of the Seller's Affiliates' manufacture and which are reported to the Seller within twelve calendar months from putting such Goods into operation or eighteen calendar months after their delivery, whichever period expires the sooner, (ninety days after delivery in the case of Consumables and spare parts) (the "Warranty Period") and which arise solely from faulty materials or workmanship: provided always that defective items are returned to the Seller at the Buyer's cost carriage and insurance prepaid within the Warranty Period. ("Consumables" shall include glass electrodes, membranes, liquid junctions, electrolyte and O-rings). Replaced items shall become the property of Best Engineering Services Ltd. Repaired or replacement items will be delivered by the Seller at the Seller's cost to the Buyer's mainland site in the United Kingdom or, if the Buyer is located outside the United Kingdom, FCA in the United Kingdom. The Seller will correct defects in services provided by the Seller or the Seller Affiliates and reported to the Seller within ninety days after completion of such services. Goods or services repaired, replaced or corrected in accordance with this Clause 10.1 shall be subject to the foregoing warranty for the unexpired portion of the Warranty Period or for ninety days from the date of their return to the Buyer (or completion of correction in the case of services), whichever expires later.

9.2 Goods or Services sourced by the Seller from a third party (not being the Seller Affiliate) for resale to the Buyer shall carry only the warranty extended by the original manufacturer.

9.3 Notwithstanding Clauses 10.1 and 10.2, the Seller shall not be liable for any defects caused by: fair wear and tear; materials or workmanship made, furnished or specified by the Buyer; non-compliance with the Seller's storage, installation, operation or environmental requirements; lack of proper maintenance; any modification or repair not previously authorised by the Seller in writing; nor the use of non-authorised software or spare or replacement parts. The Seller's costs incurred in investigating and rectifying such defects shall be paid by the Buyer upon demand. The Buyer shall at all times remain solely responsible for the adequacy and accuracy of all information supplied by it.

9.4 Subject to Clause 12.1, the foregoing constitutes the Seller's sole warranty and the Buyer's exclusive remedy for breach thereof. No representations, warranties or conditions of any kind, express or implied, shall apply as to satisfactory quality, merchantability, fitness for any particular purpose or any other matter with respect to any of the Goods or Services.

#### **10. PATENT, ETC. INFRINGEMENT:**

10.1 Subject to the limitations set forth in Clause 12, the Seller shall indemnify the Buyer in the event of any claim for infringement of Letters Patent, Registered Design, Design Right, Trade Mark or Copyright ("Intellectual Property Rights") existing at the date of formation of the Contract arising from the use or sale of the Goods, against all reasonable costs and damages awarded against the Buyer in any action for such infringement, or for which the Buyer may become liable in any such action, provided always that the Seller shall not be liable to so indemnify the Buyer in the event that:

- i. Such infringement arises as a result of the Seller having followed a design or instruction furnished or given by the Buyer, or the Goods having been used in a manner or for a purpose or in a country not specified by or disclosed to the Seller prior to the date of the Contract or in association or combination with any other equipment or software, or
- ii. The Seller has at its expense procured for the Buyer the right to continue to use the Goods or has modified or replaced the Goods so that the Goods no longer infringe, or
- iii. The Buyer has failed to give the Seller the earliest possible notice in writing of any claim made or to be made or of any action threatened or brought against the Buyer and/or the Buyer has failed to permit the Seller, at the Seller's expense, to conduct and control any litigation that may ensue and all negotiations for a settlement of the claim, or
- iv. The Buyer has made without the Seller's prior written consent any admission which is or may be prejudicial to the Seller in respect of any such claim or action, or
- v. The Goods have been modified without the Seller's prior written authorisation.

11.2 The Buyer warrants that any design or instructions furnished or given by it shall not cause the Seller to infringe any Intellectual Property Rights in the performance of the Seller's obligations under the Contract and shall indemnify the Seller against all reasonable costs and damages which the Seller may incur as a result of any breach of such warranty.

#### **11. LIMITATION OF LIABILITY:**

11.1 Notwithstanding any other provision of the Contract, but subject to Sub-clause 12.2, and without prejudice to Sub-clause 12.3, the Seller's and the Seller's Affiliates' combined maximum aggregate liability for any and all losses, liabilities, expenses (including legal expenses), damages, claims or actions incurred under or in connection with this Contract or any collateral contract between the parties, arising in or by virtue of breach of contract, tort (including negligence), misrepresentation, breach of statutory duty, strict liability, infringement of Intellectual Property Rights or otherwise, shall in no circumstances exceed: (i) £1,000,000 for loss of or damage to physical property, and (ii) in all other cases, the Contract Price, in either case.

11.2 Notwithstanding any other provision of the Contract but without prejudice to Sub-clause 12.3, neither the Seller nor the Seller's Affiliates shall be liable under or in connection with this Contract or any collateral contract between the parties, for any:

(i) loss of income; (ii) loss of actual or anticipated profits; (iii) loss of anticipated savings; (iv) increased costs of any kind; (v) loss of business; (vi) loss of contracts; (vii) loss of goodwill or reputation; (viii) loss of, damage to or corruption of data; (ix) claims of the Buyer's customers or (x) any indirect or consequential loss or damage of any kind, howsoever caused and whether arising by virtue of:

(i) breach of contract; (ii) tort (including negligence); (iii) misrepresentation; (iv) breach of statutory duty; (v) strict liability; or (vi) infringement of Intellectual Property Rights, whether or not such loss or damage was foreseeable or in the contemplation of the parties.

Nothing in this Contract or any collateral contract shall exclude or in any way limit the Seller's or the Seller's Affiliates' liability (i) for fraud, (ii) for death or personal injury caused by the Seller's negligence (including negligence as defined in the Unfair Contract Terms Act 1977), (iii) for breach of terms implied as to title by section 12 Sale of Goods Act 1979 or section 2 Supply of Goods and Services Act 1982, or (iv) for any liability to the extent that such liability may not be limited or excluded as a matter of law.

## **12. STATUTORY AND OTHER REGULATIONS:**

12.1 If the Seller's obligations under the Contract shall be increased or reduced by reason of the making or amendment after the date of the Seller's quotation of any law or any order, regulation or bye-law having the force of law that shall affect the performance of the Seller's obligations under the Contract, the Contract price and delivery period shall be adjusted accordingly and/or performance of the Contract suspended or terminated, as appropriate.

12.2 Except to the extent otherwise required by applicable law, the Seller shall have no responsibility for the collection, treatment, recovery or disposal of (i) the Goods or any part thereof when they are deemed by law to be 'waste' or (ii) any items for which the Goods or any part thereof are replacements. If the Seller is required by applicable law, including waste electrical and electronic equipment legislation, European Directive 2002/96/EC (WEEE) and related legislation in EU Member States, to dispose of 'waste' Goods or any part thereof, the Buyer shall, unless prohibited by applicable law, pay the Seller, in addition to the Contract price, either (i) the Seller's standard charge for disposing of such Goods or (ii) if the Seller does not have such a standard charge, the Seller's costs (including all handling, transportation and disposal costs and a reasonable mark-up for overhead) incurred in disposing of such Goods.

12.3 The Buyer's personnel shall, whilst on the Seller's premises, comply with the Seller's applicable site regulations and the Seller's reasonable instructions, including but not limited to those relating to safety, security and electrostatic discharge.

## **13. COMPLIANCE WITH LAWS**

The Buyer agrees that all applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time, including without limitation those of the United States, the European Union and the jurisdictions in which the Seller and the Buyer are established or from which items may be supplied, and the requirements of any licenses, authorisations, general licences or licence exceptions relating thereto will apply to its receipt and use of hardware, software, services and technology. In no event shall the Buyer use, transfer, release, export or re-export any such hardware, software or technology in violation of such applicable laws, regulations, orders or requirements or the requirements of any licences, authorisations or licence exceptions relating thereto. The Buyer agrees furthermore that it shall not engage in any activity that would expose the Seller or any of its affiliates to a risk of penalties under laws and regulations of any relevant jurisdiction prohibiting improper payments, including but not limited to bribes, to officials of any government or of any agency, instrumentality or political subdivision thereof, to political parties or political party officials or candidates for public office, or to any employee of any customer or supplier. The Buyer agrees to comply with all appropriate legal, ethical and compliance requirements.

## **14. DEFAULT, INSOLVENCY AND CANCELLATION:**

The Seller shall be entitled, without prejudice to any other rights it may have, to cancel the Contract forthwith, wholly or partly, by notice in writing to the Buyer, if (a) the Buyer is in default of any of its obligations under the Contract and fails, within 30 (thirty) days of the date of the Seller's notification in writing of the existence of the default, either to rectify such default if it is reasonably capable of being rectified within such period or, if the default is not reasonably capable of being rectified within such period, to take action to remedy the default or (b) on the occurrence of an Insolvency Event in relation to the Buyer. "Insolvency Event" in relation to the Buyer means any of the following: (i) a meeting of creditors of the Buyer being held or an arrangement or composition with or for the benefit of its creditors (including a voluntary arrangement as defined in the Insolvency Act 1986) being proposed by or in relation to the Buyer; (ii) a chargeholder, receiver, administrative receiver or similar person taking possession of or being appointed over or any distress, execution or other process being levied or enforced (and not being discharged within seven days) on the whole or a material part of the assets of the Buyer; (iii) the Buyer ceasing to carry on business or being unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; (iv) the Buyer or its directors or the holder of a qualifying floating charge giving notice of their intention to appoint, or making an application to the court for the appointment of, an administrator; (v) a petition being presented (and not being discharged within 28 days) or a resolution being passed or an order being made for the administration or the winding-up, bankruptcy or dissolution of the Buyer; or (vi) the happening in relation to the Buyer of an event analogous to any of the above in any jurisdiction in which it is incorporated or resident or in which it carries on business or has assets. The Seller shall be entitled to recover from the Buyer or the Buyer's representative all costs and damages incurred by the Seller as a result of such cancellation, including a reasonable allowance for overheads and profit (including but not limited to loss of prospective profits and overheads).

## **15. MISCELLANEOUS:**

15.1 No waiver by either party with respect to any breach or default or of any right or remedy and no course of dealing, shall be deemed to constitute a continuing waiver of any other breach or default or of any other right or remedy, unless such waiver be expressed in writing and signed by the party to be bound.

15.2 If any clause, sub-clause or other provision of the Contract is invalid under any statute or rule of law, such provision, to that extent only, shall be deemed to be omitted without affecting the validity of the remainder of the Contract.

15.3 The Buyer shall not be entitled to assign its rights or obligations hereunder without the prior written consent of the Seller.

15.4 The Seller enters into the Contract as principal. The Buyer agrees to look only to the Seller for due performance of the Contract.

15.5 The Contract shall in all respects be construed in accordance with the laws of England excluding, however, any effect on such laws of the 1980 Vienna Convention on Contracts for the International Sale of Goods, and to the fullest extent permitted by law, shall be without regard to any conflict of laws or rules which might apply the laws of any other jurisdiction. All disputes arising out of the Contract shall be subject to the exclusive jurisdiction of the English courts.

15.6 The headings to the Clauses and paragraphs of the Contract are for guidance only and shall not affect the interpretation thereof.

15.7 All notices and claims in connection with the Contract must be in writing.