

## Terms and conditions of Metallic Elephant

The Customer's attention is particularly drawn to the provisions of **clause 12**.

### 1. Interpretation

1.1 Definitions. In these Conditions, the following definitions apply:

<b>"Artwork"</b>	has the meaning set out in <b>clause 3.2</b>
<b>"Business Day"</b>	a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business
<b>"Commencement Date"</b>	has the meaning set out in <b>clause 2.2</b>
<b>"Conditions"</b>	these terms and conditions as amended from time to time in accordance with <b>clause 15.7</b>
<b>"Contract"</b>	the contract between the Supplier and the Customer for the supply of Goods and/or Services in accordance with these Conditions
<b>"Customer"</b>	the person, firm or company who purchases the Goods and/or Services from the Supplier
<b>"Delivery Location"</b>	has the meaning set out in <b>clause 4.3</b>
<b>"Deposit"</b>	has the meaning set out in <b>clause 2.10</b>
<b>"Force Majeure Event"</b>	has the meaning given to it in <b>clause 14.1</b>
<b>"Goods"</b>	means the hot foil machines and/or hot foil blocks, stamps or dies (or any part of them) that have been manufactured by the Supplier, as set out in the Order
<b>"Goods Specification"</b>	any specification for the Goods, including any Artwork, bespoke requirements, relevant plans or drawings, that is/are agreed in writing by the Customer and the Supplier
<b>"Intellectual Rights"</b>	<b>Property</b> patents, rights to inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world
<b>"Order"</b>	the Customer's order for the supply of Goods and/or Services, as set out overleaf

<b>"Refurbished Goods"</b>	means hot foil machines that have been refurbished or repaired by the Supplier
<b>"Serviced Goods"</b>	means hot foil machines that the Supplier is providing the Services to that contain Serviced Parts
<b>"Serviced Parts"</b>	has the meaning set out in <b>clause 5.3</b>
<b>"Services"</b>	means the installation, repair or service of hot foil machines as set out in the Service Specification below
<b>"Service Specification"</b>	the description or specification for the Services provided in writing by the Supplier to the Customer
<b>"Supplier"</b>	means Metallic Elephant, a firm, whose trading address is Unit 3, Frating Hall Farm Industrial Estate, Colchester, Essex CO7 7HD
<b>"Supplier Materials"</b>	has the meaning set out in <b>clause 8.1.7</b>

1.2 **"Construction"**. In these Conditions, the following rules apply:

- 1.2.1 a person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality);
- 1.2.2 a reference to a party includes its personal representatives, successors or permitted assigns;
- 1.2.3 a reference to a statute or statutory provision is a reference to such statute or statutory provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted;
- 1.2.4 any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms; and
- 1.2.5 a reference to writing or written includes faxes and e-mails.

**2. Basis of contract**

- 2.1 The Order constitutes an offer by the Customer to purchase Goods and/or Services in accordance with these Conditions.
- 2.2 The Order shall only be deemed to be accepted when the Supplier issues written acceptance of the Order at which point and on which date the Contract shall come into existence ("**Commencement Date**").
- 2.3 The Contract constitutes the entire agreement between the parties. The Customer acknowledges that it has not relied on any statement, promise, representation, assurance or warranty made or given by or on behalf of the Supplier which is not set out in the Contract.
- 2.4 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 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.

- 2.5 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.
- 2.6 Subject to **clause 2.7** 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.
- 2.7 Any quotation involving Artwork shall not constitute an offer unless otherwise stated in writing.
- 2.8 All of these Conditions shall apply to the supply of both Goods and Services, except where application to one or the other is specified.
- 2.9 All terms expressed to apply to Goods shall also apply to Refurbished Goods, except where application to one or the other is specified.
- 2.10 The Supplier may request that a proportion of the price of the Goods is paid when the Order is placed ("**Deposit**"). If the Order is cancelled the Deposit will only be returned if no work has started on the Order. If any work has started on the Order, upon cancellation such proportion of the Deposit (up to the whole of the Deposit) will be retained by the Supplier as is equal to the costs and expenses incurred by the Supplier in connection with the cancelled Order.
- 2.11 Where bespoke Goods are ordered by the Customer the Supplier may request that the total price of the Goods is paid when the Order is placed.

### 3. Goods

- 3.1 The Goods are described in the Supplier's catalogue or as modified by any applicable Goods Specification.
- 3.2 If the Customer is ordering Goods that comprise of or include hot foil blocks, stamps or dies the Customer must provide the artwork it would like the Supplier to produce onto the hot foil blocks, stamps or dies ("**Artwork**") and the Customer licenses to the Supplier, free of charge, to copy and re-produce the Artwork for the purpose of fulfilling the Order.
- 3.3 The Customer authorises the Supplier to hold any Goods containing any Artwork until the Supplier has been paid for the Goods in full, or to dispose of the Goods under **clause 4.8**, provided that no Artwork is used, sold onto a third party or reproduced by the Supplier.
- 3.4 Any Artwork supplied by the Customer must comply with the following:
  - 3.4.1 Any pictures and/or fonts must be in outline only (i.e. no fill); and
  - 3.4.2 The Artwork the Customer provides will be deemed to be what the Customer wants the Artwork to look like and will be the document the Supplier works from to produce the Artwork onto the Goods<sup>1</sup>.
  - 3.4.3 Subject to **clause 3.4.8** the Supplier will reproduce all Artwork to the same size as the version provided by the Customer, unless the Customer otherwise requests in writing;

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- 3.4.4 Artwork is accepted on the following mediums:
- (a) film;
  - (b) paper; or
  - (c) digital file/PDF (e.g. Microsoft word, adobe illustrator etc.).
- 3.4.5 Depending on which medium is used under **clause 3.4.4**, the Artwork must:
- (a) read from right to left; and
  - (b) if film is used, be negative, with the emulsion side facing upwards; or
  - (c) if paper is used, be in black and white and printed using a laser printer, not an inkjet printer, as this is unsuitable; or
  - (d) if a digital file or PDF is used, all security settings must be removed and it must be 100% process black.
- 3.4.6 If the Customer wants the Goods containing Artwork to be produced in the same day the Artwork must be received by the Supplier by 13:00 on the day in question, and include full measurements that comply with **clause 3.4.7**.
- 3.4.7 Measurements must be provided but they must not be provided in fractions. Where fractions exist they must be expressed using a decimal point. For example (but not limited to)  $\frac{1}{2} = 0.5$  and  $\frac{1}{4} = 0.25$ . Any fraction must be either rounded up or rounded down to the nearest figure using two decimal places. For example (but not limited to)  $0.5999 = 0.60$  and or  $0.32567 = 0.33$ .
- 3.4.8 The Supplier will use reasonable care and skill to produce the Artwork on the Goods to the exact measurements, however, due to technical reasons, absolute precision is not guaranteed.
- 3.4.9 The Supplier will not return the Artwork unless otherwise agreed in writing with the Customer.
- 3.4.10 Any film(s) created by the Supplier from the Artwork to produce the Goods under the Customer's Order is/are owned by the Supplier. The Artwork and/or any film(s) is/are usually kept by the Supplier on file for approximately 6 months before it is/they are destroyed, but the Supplier reserves the right to dispose of the Artwork and/or film(s) before this time.
- 3.4.11 The Order includes producing 1 version of the Artwork. Any additional version(s) that are required are not included in the price of the Order and the Customer will be responsible for any additional costs incurred by the Supplier in producing amended pieces of Artwork and/or film(s) (that the Artwork is printed on to produce the Goods), unless the Artwork and/or film(s) needed to be amended due to the Supplier's error.
- 3.4.12 If no Artwork is supplied by the Customer, but the Customer has ordered Goods that contain Artwork, the Supplier will produce the Artwork for the Customer's approval for an additional cost agreed between the Customer and Supplier before production of the Artwork starts. If the Artwork requires any amendment(s) **clause 3.4.11** applies.

- 3.4.13 The Customer is responsible for ensuring that any Artwork created by the Customer or Supplier is appropriate (including in size, shape and overall design) for the Customer's ultimate purpose (i.e. that the Artwork would be suitable for stamping onto a seat cover, or handbag etc.).
- 3.4.14 The Customer is responsible for checking that any Artwork is correct before using any Goods containing the Artwork.
- 3.4.15 To the extent that the Goods are to be manufactured in accordance with a Goods Specification supplied by the Customer, the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other professional costs and expenses) suffered or incurred by the Supplier in connection with any claim made against the Supplier for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with the Supplier's use of the Goods Specification. This **clause 3.4.15** shall survive termination of the Contract.
- 3.5 The Supplier reserves the right to amend the Goods Specification if required by any applicable statutory or regulatory requirements, or to ensure that it complies with **clauses 5.1 - 5.3** (inclusive), but any amendments must be approved by the Customer before the Goods are produced.
- 4. Delivery of Goods and Serviced Goods**
- 4.1 For the avoidance of doubt, reference to "Goods" in **clauses 4.3 - 4.7** (inclusive) also apply to "Serviced Goods".
- 4.2 The Supplier shall ensure that if the Supplier requires the Customer to return any packaging material to the Supplier, that fact is clearly stated on the Order. The Customer shall make any such packaging materials available for collection at such times as the Supplier shall reasonably request. Returns of packaging materials shall be at the Supplier's expense. For the avoidance of doubt, this clause also applies to Serviced Goods.
- 4.3 Whether the Goods are being delivered or collected will be set out in the Order, and:
- 4.3.1 if the Goods are being delivered the Supplier shall arrange for a third party to deliver the Goods to the location set out in the 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; or
- 4.3.2 the Customer shall collect the Goods from the Supplier's premises at Metallic Elephant, Unit 3, Frating Hall Farm Industrial Estate, Frating, Colchester, Essex CO7 7HD or such other location as may be advised by the Supplier before delivery ("**Delivery Location**") within 3 Business Days of the Supplier notifying the Customer that the Goods are ready.
- 4.4 If the Goods are being delivered, delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location, or if the Goods are being collected, when the Customer, its employees, agents or subcontractors, take physical control of the Goods at the Delivery Location, for example (but not limited to) lifting or moving the Goods, or attempting to do the same.

- 4.5 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 third party (including, but not limited to, the Royal Mail or other delivery service), 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.
- 4.6 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.
- 4.7 If the Customer fails to:
- 4.7.1 pay for the Goods and/or Services before delivery or collection; or
- 4.7.2 accept or take delivery of the Goods,
- within 7 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 and/or Services:
- (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the second Business Day following the day on which the Supplier notified the Customer that the Goods were ready for delivery or collection; and
- (b) the Supplier shall store the Goods until payment and/or delivery/collection takes place, and charge the Customer for all related costs and expenses (including insurance).
- 4.8 If 60 Business Days after the Supplier notified the Customer that the Goods were ready for delivery or collection, or in the case of Serviced Goods 80 Business Days after the Supplier notified the Customer that the Serviced Goods were ready for delivery or collection, the Customer has not taken or accepted delivery of them, the Supplier may resell or otherwise dispose of part or all of the Goods or Serviced Goods and, after deducting reasonable storage and selling costs, account to the Customer for any excess over the price of the Goods or Serviced Goods or charge the Customer for any shortfall below the price of the Goods or Serviced Goods (including any costs and expenses the Supplier is unable to achieve because of the bespoke nature of the Goods or Serviced Goods).
- 4.9 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.

## **5. Quality of Goods**

- 5.1 This clause applies to Goods(excludes dies) only. The Supplier warrants that on delivery, and for a period of 6 months, unless specified otherwise, from the date of delivery ("**warranty period for Goods**"), the Goods shall:
- 5.1.1 conform with their description and any applicable Goods Specification;
- 5.1.2 be free from material defects in design, material and workmanship;

- 5.1.3 be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
- 5.1.4 be fit for any purpose held out by the Supplier.
- 5.2 This clause applies to Refurbished Goods only. The Supplier warrants that on delivery, and for a period of 3 months, unless specified otherwise, from the date of delivery ("**warranty period of Refurbished Goods**"), the Refurbished Goods shall:
  - 5.2.1 conform with their description and any applicable Goods Specification;
  - 5.2.2 be free from material defects in design, material and workmanship;
  - 5.2.3 be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
  - 5.2.4 be fit for any purpose held out by the Supplier.
- 5.3 For the avoidance of doubt, no warranty is provided by the Supplier for the goods that the Supplier provides the Services to. However, the Supplier warrants that any parts installed by the Supplier into such goods ("**Serviced Parts**"), will on delivery, and for a period of 3 months from the date of delivery:
  - 5.3.1 conform with their description and any applicable Goods Specification;
  - 5.3.2 be free from material defects in design, material and workmanship;
  - 5.3.3 be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
  - 5.3.4 be fit for any purpose held out by the Supplier.
- 5.4 Subject to **clause 5.6**, for all Goods that do not involve Artwork, if:
  - 5.4.1 the Customer gives notice in writing during the relevant warranty period that some or all of the Goods or Serviced Parts do not comply with the warranty set out in **clause 5.1, clause 5.2 or clause 5.3**;
  - 5.4.2 the Supplier is given a reasonable opportunity of examining such Goods or the Serviced Parts in the Serviced Goods; and
  - 5.4.3 the Customer (if asked to do so by the Supplier) returns such Goods or Serviced Goods to the Supplier's place of business at the Supplier's cost,  
  
the Supplier shall, at its option, repair or replace the defective Goods or Serviced Parts, or refund the price of the defective Goods or Serviced Parts in full.
- 5.5 Subject to **clause 5.6**, in the case of any Goods that contain Artwork:
  - 5.5.1 the Customer must give notice in writing if any Goods containing Artwork is/are incorrect or faulty within 3 Business Days from delivery or collection of the Goods in question;
  - 5.5.2 the Customer must return the Goods containing the incorrect or faulty Artwork to the Supplier within the time limit specified in **clause 5.5.1**; and
  - 5.5.3 after examining the Goods containing the incorrect or faulty Artwork the Supplier shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

- 5.6 The Supplier shall not be liable for the Goods' or Serviced Parts failure to comply with the warranty in **clause 5.1, clause 5.2 or clause 5.3** if:
- 5.6.1 if the Goods or Serviced Goods are collected, any damage that occurs to the Goods or Serviced Goods when handled by a third party, the Customer, its employees, agents or subcontractors and/or while the Goods or Serviced Goods are in transit;
  - 5.6.2 the Customer makes any further use of such Goods or Serviced Goods after giving a notice in accordance with **clause 5.4.1 or clause 5.5.1**;
  - 5.6.3 the defect arises because the Customer failed to follow the Supplier's oral or written instructions as to the storage, commissioning, use or maintenance of the Goods or Serviced Goods or (if there are none) good trade practice;
  - 5.6.4 the defect arises as a result of the Goods or Serviced Goods being installed by the Customer or a third party;
  - 5.6.5 the defect arises to the Goods or Serviced Goods as a result of the Supplier following any drawing, design or Goods Specification supplied by the Customer;
  - 5.6.6 the defect results from the Supplier using Artwork provided by and/or approved by the Customer;
  - 5.6.7 the Customer or a third party alters or repairs such Goods or Serviced Goods without the written consent of the Supplier;
  - 5.6.8 the Customer or a third party dismantles such Goods or Serviced Goods without the written consent of the Supplier;
  - 5.6.9 the defect arises to the Goods or Serviced Goods due to a part or part(s) of the Goods or Serviced Goods that were not supplied and/or fitted by the Supplier;
  - 5.6.10 the defect arises as a result of intentional overloading, experiments with materials that the Goods or Serviced Goods are not intended to be used with, fair wear and tear, wilful damage, negligence, or abnormal working conditions;
  - 5.6.11 the defect arises due to the Customer's neglect (for example, but not limited to, failing to keep the Goods or Serviced Goods in a proper state of repair or through failure to keep the Goods or Serviced Goods maintained in accordance with the Supplier's oral or written instructions (or if there are none, good trade practices));
  - 5.6.12 the defect arises to the Goods or Serviced Goods due to a poor working environment which includes (but is not limited to) excessive dust or other processed waste, excessive heat or excessive cold, a contaminated compressed air supply and/or poor electric power supply;
  - 5.6.13 the defect arises due to an extraneous cause, including, but not limited to fire, lightening, explosion, aircraft, or other aerial devices or articles dropped from such aircraft, storm, tempest, flood, inundation, escape of water from water containing apparatus, leakage from sprinkler installations, theft or attempted theft or damage from any other extraneous cause, including damage from objects or equipment not forming a part of the Goods or Serviced Goods and surges, variations or failure in electrical supply;
  - 5.6.14 the Goods differ from their description and/or the Goods Specification or in the case of Serviced Goods, any Goods Specification, as a result of changes made to ensure they comply with applicable statutory or regulatory standards and/or any changes approved by the Customer.



5.7 Except as provided in this **clause 5**, the Supplier shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in **clause 5.1**, or in the case of the Refurbished Goods, the warranty set out in **clause 5.2**, or in the case of Serviced Parts, the warranty set out in **clause 5.3**.

5.8 The terms of these Conditions shall apply to any repaired or replacement Goods or Serviced Parts, or any repaired Refurbished Goods supplied by the Supplier under **clauses 5.4 or 5.5**.

## **6. Title and risk**

6.1 The risk in the Goods shall pass to the Customer on completion of delivery or when the Goods are collected (as described in **clause 4.4**).

6.2 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, in which case title to the Goods shall pass at the time of payment.

6.3 The Goods will not be delivered or made available for collection unless and until the Supplier has been paid for the Goods in full.

## **7. Supply of Services**

7.1 The Supplier shall provide the Services to the Customer in accordance with the Service Specification in all material respects.

7.2 The Supplier shall use all reasonable endeavours to meet any performance dates for the Services specified in the Order, but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.

7.3 The Supplier shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and the Supplier shall notify the Customer in any such event.

7.4 The Supplier warrants to the Customer that the Services will be provided using reasonable care and skill.

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

8.1 In addition to any relevant provisions under **clause 3** the Customer shall:

8.1.1 ensure that the terms of the Order and (if submitted by the Customer) the Goods Specification and/or any Service Specification are complete and accurate;

8.1.2 co-operate with the Supplier in all matters relating to the Goods and/or Services;

8.1.3 (where necessary) provide the Supplier, its employees, agents, consultants and subcontractors, with access to the Customer's premises and other facilities as reasonably required by the Supplier to provide the Services;

8.1.4 provide the Supplier with such information as the Supplier may reasonably require to supply the Goods and/or Services, and ensure that such information is accurate in all material respects;

8.1.5 if set out in the Order or expressly agreed between the parties that the Services will be supplied at the Customer's premises, prepare the Customer's premises for the supply of the Services;

- 8.1.6 obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start;
  - 8.1.7 (where necessary) keep and maintain all materials, equipment, documents and other property of the Supplier ("**Supplier Materials**") at the Customer's premises in safe custody at its own risk, maintain the Supplier Materials in good condition until returned to the Supplier, and not dispose of or use the Supplier Materials other than in accordance with the Supplier's written instructions or authorisation; and
  - 8.1.8 any other relevant obligations.
- 8.2 If the Supplier's performance of any of its obligations in respect of manufacturing the Goods and/or performing the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation ("**Customer Default**"):
- 8.2.1 the Supplier shall without limiting its other rights or remedies have the right to suspend manufacture of the Goods and/or performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays the Supplier's performance of any of its obligations;
  - 8.2.2 the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from the Supplier's failure or delay to perform any of its obligations as set out in **clause 8.2**;
  - 8.2.3 the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from;
    - (a) Artwork being received later than the time-limit specified in **clause 3.4.6**;
    - (b) As a result of incorrect or faulty Artwork being provided or approved by the Customer;
    - (c) As a result of the Customer not giving notice to the Supplier within the time-limit specified in **clause 5.5.1**; and/or
    - (d) As a result of any Artwork being lost or damaged after the Goods have been produced; and
  - 8.2.4 the Customer shall reimburse the Supplier on written demand for any costs or losses sustained or incurred by the Supplier arising directly or indirectly from the Customer Default.

## **9. Charges and payment**

- 9.1 The price for Goods shall be the price set out in the Order or, if no price is quoted, the price set out in the Supplier's published price list as at the date of delivery. The price of the Goods is exclusive of all costs and charges of packaging, insurance, transport of the Goods, which shall be paid by the Customer when it pays for the Goods.
- 9.2 When calculating the price of an Order the Supplier will round up all fractions to the nearest 25 square centimetres.
- 9.3 The charges for Services shall be on a time and materials basis:
  - 9.3.1 the charges shall be calculated in accordance with the Supplier's agreed rate;

- 9.3.2 the Supplier's standard daily fee rates for each individual person are calculated on the basis of an eight-hour day from 8.00 am to 5.00 pm worked on Business Days;
- 9.3.3 the Supplier shall be entitled to charge an overtime rate of 50 per cent of the standard daily fee rate on a pro-rata basis for each part day or for any time worked by individuals whom it engages on the Services outside the hours referred to in **clause 9.3.2**;
- 9.3.4 the Supplier shall be entitled to charge the Customer for any expenses reasonably incurred by the individuals whom the Supplier engages in connection with providing the Services at the Customer's premises including, but not limited to, travelling expenses, hotel costs, subsistence and any associated expenses, and for the cost of services provided by third parties and required by the Supplier for the performance of the Services, and for the cost of any materials that are required, including (but not limited to) new parts; and
- 9.3.5 the charges for the Services do not include the cost of delivery or collection of the goods to be serviced, which the Customer is responsible for.
- 9.4 If the Services are not being provided at the Customer's premises, whether the goods to be serviced by the Supplier are being:
- 9.4.1 delivered by the Customer; or
- 9.4.2 collected by the Supplier
- before the Services are to be supplied, will be set out in the Order.
- 9.4.3 The location of:
- (a) delivery of the goods to be serviced will be Unit 3, Frating Hall Farm Industrial Estate, Colchester, Essex CO7 7HD, or as otherwise set out in the Order; or
- (b) where the goods to be serviced are to be collected from, will be set out in the Order,
- or as otherwise agreed between the parties.
- 9.5 The provisions of **clause 4** shall apply to the collection or delivery of Serviced Goods.
- 9.6 The Supplier reserves the right to:
- 9.6.1 increase its standard daily fee rates for the charges for the Services, provided that such charges cannot be increased more than once in any 1] month period. The Supplier will give the Customer written notice of any such increase 2 months before the proposed date of the increase. If such increase is not acceptable to the Customer, it shall notify the Supplier in writing within 3 weeks of the date of the Supplier's notice and the Supplier shall have the right without limiting its other rights or remedies to terminate the Contract by giving 3 weeks' written notice to the Customer; and
- 9.6.2 increase the price of the Goods, by giving notice to the Customer at any time before delivery or collection, to reflect any increase in the cost of the Goods to the Supplier that is due to:

- (a) any factor beyond the control of the Supplier (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials/parts and other manufacturing costs);
  - (b) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Goods Specification; or
  - (c) any delay caused by any instructions of the Customer in respect of the Goods or failure of the Customer to give the Supplier adequate or accurate information or instructions in respect of the Goods.
- 9.7 In respect of Goods and/or Services, the Supplier shall invoice the Customer before delivery or collection.
- 9.8 All amounts payable by the Customer under the Contract are exclusive of amounts in respect of value added tax chargeable from time to time ("**VAT**"). Where any taxable supply for VAT purposes is made under the Contract by the Supplier to the Customer, the Customer shall, on receipt of a valid VAT invoice from the Supplier, pay to the Supplier such additional amounts in respect of VAT as are chargeable on the supply of the Services or Goods at the same time as payment is due for the supply of the Services or Goods.
- 9.9 If the Customer fails to make any payment due to the Supplier under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 4% per annum above The Bank of England's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.
- 9.10 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding except as required by law.
- 9.11 The Supplier may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by the Supplier to the Customer.

## **10. Intellectual property rights**

- 10.1 The Customer warrants to the Supplier that it owns all of the Intellectual Property Rights in the Artwork or, if it does not, the Customer has obtained and will maintain the necessary licences, permissions and consents from the owners of the Artwork, or owners of part of the Artwork, to ensure that the Supplier will not be in breach of any third party's Intellectual Property Rights when creating and supplying the Goods under the Customer's Order or under **clause 3.3**.
- 10.2 The Intellectual Property Rights in the Goods shall be owned by the Supplier, and the Intellectual Property Rights created by the Supplier in the Refurbished Goods shall be owned by the Supplier.
- 10.3 All Intellectual Property Rights in or arising out of or in connection with the provision of the Services shall be owned by the Supplier.
- 10.4 All Supplier Materials are the exclusive property of the Supplier.

## **11. Confidentiality**

A party ("**receiving party**") 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 receiving party by the other party ("**disclosing party**"), its employees, agents or subcontractors, and any other confidential information concerning the disclosing party's business, its products and services which the receiving party may obtain. The receiving party shall only disclose such confidential information to those of its employees, agents and subcontractors who need to know it for the purpose of discharging the receiving party's obligations under the Contract, and shall ensure that such employees, agents and subcontractors comply with the obligations set out in this clause as though they were a party to the Contract. The receiving party may also disclose such of the disclosing party's confidential information as is required to be disclosed by law, any governmental or regulatory authority or by a court of competent jurisdiction. This **clause 11** shall survive termination of the Contract.

## **12. Limitation of liability: THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CLAUSE**

12.1 Nothing in these Conditions shall limit or exclude the Supplier's liability for:

12.1.1 death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors;

12.1.2 fraud or fraudulent misrepresentation;

12.1.3 breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession);

12.1.4 breach of the terms implied by section 12 of the Sale of Goods Act 1979 (title and quiet possession); or

12.1.5 defective products under the Consumer Protection Act 1987.

12.2 Subject to **clause 12.1**:

12.2.1 the Supplier shall under no circumstances whatever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract; and

12.2.2 the Supplier's total liability to the Customer in respect of:

- (a) all other losses arising under or in connection with the Contract in contract shall in no circumstances exceed the price of the Goods and/or the Services; and
- (b) all other losses arising under or in connection with the Contract in tort (including negligence), breach of statutory duty (or otherwise) in connection with product liability shall in no circumstances exceed £5,000,000.00; and
- (c) all other losses arising under or in connection with the Contract in tort (including negligence) breach of statutory duty (or otherwise) in connection with public liability shall in no circumstances exceed £1,250,000.00.

12.3 The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 and the terms implied by sections 3 to 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from the Contract.

12.4 This **clause 12** shall survive termination of the Contract.

### **13. Termination**

13.1 Without limiting its other rights or remedies, each party may terminate the Contract with immediate effect by giving written notice to the other party if:

13.1.1 the other party commits a material breach of its obligations under this Contract and (if such breach is remediable) fails to remedy that breach within 14 days after receipt of notice in writing to do so;

13.1.2 the other party 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 (being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or (being an individual) is deemed either unable to pay its debts or as having no reasonable prospect of so doing, in either case, within the meaning of section 268 of the Insolvency Act 1986 or (being a partnership) has any partner to whom any of the foregoing apply;

13.1.3 the other party 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 (where a company) for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;

13.1.4 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 other party (being a company) other than for the sole purpose of a scheme for a solvent amalgamation of the other party with one or more other companies or the solvent reconstruction of that other party;

13.1.5 the other party (being an individual) is the subject of a bankruptcy petition or order;

13.1.6 a creditor or encumbrancer of the other party 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 its assets and such attachment or process is not discharged within 14 days;

- 13.1.7 an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the other party (being a company);
- 13.1.8 the holder of a qualifying charge over the assets of the other party (being a company) has become entitled to appoint or has appointed an administrative receiver;
- 13.1.9 a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
- 13.1.10 any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in **clause 13.1.2** to **clause 13.1.9** (inclusive);
- 13.1.11 the other party suspends, threatens to suspend, ceases or threatens to cease to carry on, all or substantially the whole of its business;
- 13.1.12 the other party's financial position deteriorates to such an extent that in the Supplier's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy; or
- 13.1.13 the other party (being an individual) dies or, by reason of illness or incapacity (whether mental or physical), is incapable of managing his own affairs or becomes a patient under any mental health legislation.
- 13.2 Without limiting its other rights or remedies, the Supplier may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under this Contract on the due date for payment.
- 13.3 Without limiting its other rights or remedies, the Supplier may suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between the Customer and the Supplier if the Customer fails to pay any amount due under this Contract on the due date for payment, the Customer becomes subject to any of the events listed in **clause 13.1.2** to **clause 13.1.13**, or the Supplier reasonably believes that the Customer is about to become subject to any of them.
- 13.4 On termination of the Contract for any reason:
  - 13.4.1 the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has yet been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;
  - 13.4.2 the Customer shall return all of the Supplier Materials. 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;
  - 13.4.3 the accrued rights and remedies of the parties as at termination shall not be affected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry; and
  - 13.4.4 clauses which expressly or by implication have effect after termination shall continue in full force and effect.

#### **14. Force majeure**

- 14.1 For the purposes of this Contract, "**Force Majeure Event**" means an event beyond the reasonable control of the Supplier including but not limited to 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 subcontractors.
- 14.2 The Supplier shall not be liable to the Customer as a result of any delay or failure to perform its obligations under this Contract as a result of a Force Majeure Event.
- 14.3 If the Force Majeure Event prevents the Supplier from providing any of the Services and/or Goods for more than 6 weeks, the Supplier shall, without limiting its other rights or remedies, have the right to terminate this Contract immediately by giving written notice to the Customer.

#### **15. General**

- 15.1 Assignment and other dealings.
- 15.1.1 The Supplier may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party.
- 15.1.2 The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, subcontract, declare a trust over or deal in any other manner with all or any of its rights or obligations under the Contract.
- 15.2 Notices.
- 15.2.1 Any notice or other communication given to a party under or in connection with this Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally or sent by prepaid first-class post or other next working day delivery service, or by commercial courier or fax.
- 15.2.2 A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in **clause 15.2.1**; 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; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by fax, one Business Day after transmission.
- 15.2.3 The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action
- 15.3 Severance.



- 15.3.1 If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Contract.
- 15.3.2 If any provision or part-provision of this Contract is invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.
- 15.4 Waiver. A waiver of any right under the Contract or law is only effective if it is in writing and shall not be deemed to be a waiver of any subsequent breach or default. No failure or delay by a party in exercising any right or remedy under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor prevent or restrict its 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.
- 15.5 No partnership or agency. Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, nor constitute either party the agent of another party for any purpose. Neither party shall have authority to act as agent for, or to bind, the other party in any way.
- 15.6 Third parties. A person who is not a party to the Contract shall not have any rights to enforce its terms.
- 15.7 Variation. Except as set out in these Conditions, no variation of the Contract, including the introduction of any additional terms and conditions shall be effective unless it is agreed in writing and signed by the Supplier.
- 15.8 Governing law. This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
- 15.9 Jurisdiction 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 Contract or its subject matter or formation (including non-contractual disputes or claims).