

K. JAMES SOFTWARE DEVELOPMENT CONDITIONS OF SUPPLY

A. Definitions

In this document:-

- (i) "CONTRACTOR" means Dr. K. James, t/a K. James Software Development of 22 Beech Road, Norton, Stourbridge, West Midlands, DY8 2AR.
- (ii) "CUSTOMER" means a purchaser of software and/or services from the CONTRACTOR.
- (iii) "Application" means the system, installation or context in which the CUSTOMER applies the software or information supplied by the CONTRACTOR.
- (iv) "Software" means the executable software and associated machine readable files purchased by the CUSTOMER from the CONTRACTOR.
- (v) "Contract" means a contract for the supply of Software and/or services by the CONTRACTOR to which the terms and conditions laid out herein apply.

B. Basis of Supply

- 1. These Conditions are the only terms and conditions on which the CONTRACTOR is prepared to deal with the CUSTOMER and these Conditions shall apply to the exclusion of any other express or implied conditions, including any terms and conditions to which the order of the CUSTOMER may purport to be subject.
- 2. No variation or addition to these Conditions shall be binding upon the CONTRACTOR unless agreed in writing between the CONTRACTOR and a duly authorised representative of the CUSTOMER.
- 3. Subject to any variation in accordance with the immediately preceding paragraph, these Conditions (together with the matters referred to on the face of the CONTRACTOR's quotation and/or acceptance of order) embody the entire understanding of the parties and override any prior promises, undertakings or representations.
- 4. Software development and provision of related services will be carried out strictly in accordance with an agreed specification and quotation. Unless otherwise agreed in writing the quotation and specification, together with the provisions laid out herein form the sole basis for all work undertaken.
- 5. The CUSTOMER must check for any errors or omissions in the specification before placing an order. The CONTRACTOR will accept no liability for any such errors or omissions.
- 6. Upon placing an order against a specification the CUSTOMER must sign a copy of the specification and return it to the CONTRACTOR. The CUSTOMER is then deemed to have accepted the specification as an adequate description of the software and/or services to be provided and is further deemed to have accepted the terms and conditions laid out herein.
- 7. The specification for software or services to be provided is based on the CUSTOMER's requirements as understood by the CONTRACTOR. The CONTRACTOR will not be responsible for analysing the Application; ensuring that the CUSTOMER's requirements are reasonable or safe in the context of the Application; or for advising the CUSTOMER if any such requirement may result in hazardous or unreliable operation of its system or installation.
- 8. Unless otherwise agreed in writing, the CONTRACTOR will not assume responsibility for integrating the software into the CUSTOMER's installation or system. It is the CUSTOMER's responsibility to ensure that the software, once delivered, is installed and operated in a safe manner.
- 9. Any recommendations which the CONTRACTOR may make to the CUSTOMER regarding software or hardware products or services provided by third parties do not constitute a guarantee and/or warranty of any kind in regard to the performance, efficiency or reliability of that software or hardware product or service even if the CONTRACTOR has arranged the purchase of that software or hardware product or service on behalf of the CUSTOMER. The CONTRACTOR will not be liable if such products or services prove to be unreliable or fail to conform to the manufacturer's description on which the CONTRACTOR's recommendation was based.
- 10. Unless otherwise agreed in writing it is the CUSTOMER's sole responsibility to ensure that the Software and any associated system is used in a manner that does not infringe any statutory or contractual obligations that the CUSTOMER has entered into with any third party. The CONTRACTOR shall not be liable for breaches of any such obligations even if the CONTRACTOR has recommended or is otherwise aware of the intended or actual use of the Software.
- 11. Following delivery, the CONTRACTOR does not assume responsibility for retaining back-up copies of the Software or documentation supplied to the CUSTOMER or of related source files. The CUSTOMER is responsible for making back-up copies of all Software supplied in accordance with the terms of the Software license laid out herein.
- 12. By accepting an order for Software or services, the CONTRACTOR assumes no obligation to offer particular terms (including prices and delivery dates) on future quotations or indeed to accept any future orders of any kind.

C. Quotations

The first quotation for any one project is supplied free of charge provided that it does not involve more than 8 hours work. Work in excess of 8 hours that may be needed to establish a specification against which to quote will, at the CONTRACTOR's discretion, be charged at the CONTRACTOR's prevailing rate (detailed in the CONTRACTOR's current Scale of Charges).

D. Payment and Delivery Schedule

- 1. Software development and related work will commence only upon receipt of a written order and initial payment (if applicable). The price for the Software and/or services will be stated on the CONTRACTOR's tender or quotation accepted by the CUSTOMER and is exclusive of any applicable value added tax or any other taxes, levies or duties which will be added or charged on invoices at appropriate rates.
- 2. Any initial payment made to the CONTRACTOR in respect of an order for Software or related services will be non-refundable.
- 3. Time is of the essence in relation to all payment dates. If the CONTRACTOR does not receive the agreed staged payments by the due date, the CONTRACTOR may, without prejudice to its other rights and remedies, terminate the Contract forthwith by notice in writing to the CUSTOMER (retaining any payments already received) or cease all work until the overdue payment(s) is/are received. Any consequent delays will result in a corresponding extension of the agreed delivery date.
- 4. If the CUSTOMER fails to make any payment by the due date, the CONTRACTOR may, without prejudice to other rights and remedies charge interest (both before and after any judgement) on a day to day basis at the rate of 4% above the base lending rate of Barclays Bank Plc from time to time until payment. The CONTRACTOR also reserves the right to withhold or suspend the functionality of any software or service supplied to the CUSTOMER under the Contract without additional notice to the CUSTOMER.
- 5. While the CONTRACTOR will endeavour to adhere to quoted delivery dates, time shall not be of the essence in relation to the performance of the delivery obligation.
- 6. After placing an order against a specification, any additions or changes to the software or services required by the CUSTOMER may, at the CONTRACTOR's discretion, incur additional charges and may result in an extension of the delivery date.

E. Cancellation of Orders

No Contract may be cancelled by the CUSTOMER except with the written consent of the CONTRACTOR and on terms that the CUSTOMER shall indemnify the CONTRACTOR in full against all loss (including loss of profit), costs (including the cost of labour and materials used), damages, charges and expenses incurred by the CONTRACTOR as a result of cancellation.

F. Copyright and Software License

- 1. Unless otherwise agreed in writing, the CONTRACTOR will retain copyright and all other rights in all Software and written documentation supplied to the CUSTOMER. The purchase price of the Software entitles the CUSTOMER only to an agreed number of licenses to use the Software. The terms of each license are as follows.
- 2. Each license permits the CUSTOMER to use one copy of the software acquired with the license on any single computer, provided that the software is in use on only one computer at any time. The software is deemed to be "in use" on a computer when it is loaded into the temporary memory (i.e. random access memory or RAM) or installed into the permanent memory (e.g. hard disk, CD ROM or other storage device) of that computer. If the CUSTOMER wishes to use the software on more than one computer it must purchase the appropriate number of additional licenses. In the case of Software supplied for use on the Internet, the Software is deemed to be in use when it is loaded into the temporary memory (i.e. random access memory or RAM) or installed into the permanent memory (e.g. hard disk, CD ROM or other storage device) of a web server and is not deemed to be in use when loaded by means of a web browser into the temporary memory of a client computer.
- 3. The Software is owned by the CONTRACTOR and is protected by UK copyright laws, international treaty provisions and all other applicable national laws. Therefore, the CUSTOMER must treat the Software like any other copyrighted material (e.g. a book) except that the CUSTOMER may make two copies of the Software solely for archival or back-up purposes and protecting its investment from loss.
- 4. The CUSTOMER may not copy the user manual(s) or other written material accompanying the Software.
- 5. The CUSTOMER may not rent or lease the Software, but may transfer its rights under this license agreement on a permanent basis to another party provided that the other party agrees to accept the terms and conditions of this license. If the CUSTOMER transfers the Software it must, at the same time, either transfer all printed manuals and all copies of the software, whether in printed or machine readable form, to the same party or destroy any copies not transferred. The CUSTOMER must reproduce and include the copyright notice on any copy of the Software. Any transfer must include the most recent update and all prior versions of the software and user manuals.
- 6. If the CUSTOMER transfers possession of any copy or part of the software to another party, the CUSTOMER's license is automatically terminated.
- 7. The CUSTOMER may not sublicense, assign or transfer this license or software except as expressly provided in this license. Any attempt otherwise to sublicense, assign or transfer any rights, duties or obligations hereunder is void.
- 8. The CUSTOMER may not reverse engineer, decompile or disassemble the Software.
- 9. The CUSTOMER may not use, copy, modify, merge or transfer the software or any copy, in whole or in part, except as expressly provided for in this license.
- 10. The license agreement enters into effect on the day on which the CUSTOMER takes delivery of the software (in whole or in part). The CUSTOMER may terminate this license agreement at any time by destroying the Software together with all copies, updates, prior versions and the printed user manual(s). It will also terminate if the CUSTOMER fails to comply with any term or condition contained herein or fails to meet the payment schedule. The CUSTOMER agrees, upon such termination, to destroy the software together with all copies, updates, prior versions and printed user manual(s).

G. Format of Software and Technical Documentation

1. All Software supplied by the CONTRACTOR will consist of executable files and, if applicable, various data and support files that may be necessary to execute the Software. Source and object files will not be provided unless otherwise agreed in writing. Files that are normally supplied as part of the operating system on which the Software is designed to run and/or which are copyrighted by a third party will not be supplied by the CONTRACTOR.
2. Software is supplied on IBM PC formatted 1.44Mbyte 3.5" diskette, and all technical documentation is supplied in A4 laser-printed format unless otherwise agreed in writing.

H. Limited Warranty

1. The CONTRACTOR warrants to the CUSTOMER that:-
 - (a) the software will for a period of 12 months from delivery provide, when properly used on the equipment for which it recommended by the CONTRACTOR, the facilities and functions set out in the agreed specification;
 - (b) the user manual(s) or other documentation (including instructional or help information incorporated in the software) will provide adequate instruction to enable the CUSTOMER to make proper use of the said facilities and functions;
 - (c) the diskettes or other recording medium upon which the software is provided will be free from defects in material and workmanship for a period of 90 days from delivery; and
 - (d) it will provide the services with reasonable care and skill.
2. Subject to the paragraph immediately following and subject to the CUSTOMER providing adequate information (in writing) about the nature of the failure or defect and (where relevant and possible) a documented example of the relevant defect or failure as soon as reasonably possible after becoming aware of the same, the CONTRACTOR shall remedy any breach of the warranties set out above free of charge. In the case of warranties (a) and (b), such remedy shall comprise the provision of a corrected version of the Software and/or user manual(s) or other documentation (or part thereof). In the case of warranty (c), it shall comprise the provision of a replacement diskette or other recording medium bearing the relevant part of the Software. The CONTRACTOR shall have no liability or obligation under the said warranties other than to remedy breaches thereof in accordance with this paragraph.
3. The CONTRACTOR shall not be in breach of the warranties set out above to the extent that the relevant defect or failure arises as a result of the modification of the Software by anyone other than the CONTRACTOR, from the use of the Software in combination with other software or devices, from flood, fire, war, act of violence, act of God or any similar occurrence, from incorrect use of the Software or operator error or from any fault in the equipment upon which the Software is used.
4. Work undertaken for the purpose of following up reports of defects or failures that are subsequently discovered to be groundless may, at the CONTRACTOR's discretion, be charged at the CONTRACTOR's standard rates from time to time in force.
5. The CONTRACTOR does not warrant that the operation of the Software (including, where in machine readable form, the user manual(s) or other documentation) will be uninterrupted or error free.
6. Subject to the foregoing, all conditions, warranties, terms and undertakings, express or implied, statutory or otherwise, in respect of the Software or the provision of the services are hereby excluded to the fullest extent permitted by law.

I. Liability

1. Save in the case of death or personal injury resulting from the negligence of the CONTRACTOR, its employees, agents or sub-contractors (where the CONTRACTOR's liability shall be unlimited), the CONTRACTOR's entire liability under or in connection with any Contract (whether in contract or in tort including negligence) shall be limited to damages of an amount which do not in total exceed:-
 - (a) £10,000 in the case of damage to the tangible property of the CUSTOMER resulting from the negligence of the CONTRACTOR, its employees, agents, or sub-contractors; and
 - (b) in any other case, the sum paid by the CUSTOMER under the relevant Contract.
2. Save in the case of death or personal injury resulting from the CONTRACTOR's negligence as referred to above, the CONTRACTOR shall not be liable to the CUSTOMER for:-
 - (a) any loss or damage whatsoever arising from:-
 - (i) any use of the Software in a "live" situation without the CUSTOMER having first carried out all such tests as may reasonably be necessary to ensure that the Software conforms to the technical and safety requirements of the Application; or
 - (ii) use of the Software in a safety-critical system (for example a life-support system) or in a system which produces, manufactures or tests components intended for subsequent use in a safety-critical application;
 - (b) loss of profits, business, revenue, anticipated savings, goodwill or any type of special indirect or consequential loss (including loss or damage suffered by the CUSTOMER as a result of any action brought by a third party) even if such a loss was reasonably foreseeable or the CONTRACTOR had been advised of the possibility of the CUSTOMER incurring the same.
3. The CUSTOMER agrees to afford the CONTRACTOR not less than 28 days (following notification thereof by the CUSTOMER) in which to remedy any breach of contract or tortious act (including negligence) arising under or in connection with a Contract (an "Event of Default").
4. Except in the case of personal injury or death caused by negligence as referred to above, the CONTRACTOR shall have no liability to the CUSTOMER in respect of any Event of Default unless the CUSTOMER shall have served notice of the same upon the CONTRACTOR within two years of the date it became aware of the circumstances giving rise to the Event of Default or the date when it ought reasonably to have become so aware.
5. Nothing in this section shall confer any right or remedy upon the CUSTOMER to which it would not otherwise be legally entitled.
6. The provisions of this section do not apply to the section headed Intellectual Property Rights Indemnity.

J. CUSTOMER Indemnity

The CUSTOMER shall indemnify the CONTRACTOR against any liability, costs (including legal costs), claims, demands or expenses which the CONTRACTOR may suffer or incur as a result of any claim or claims that use under the terms of the Contract of any material including but not limited to text images and intellectual property which the CUSTOMER supplies to the CONTRACTOR infringes copyright or any other intellectual property rights of any third party.

The CUSTOMER shall indemnify the CONTRACTOR against any liability, costs (including legal costs), claims, demands or expenses which the CONTRACTOR may suffer or incur as a result of any claim or claims whether arising under the Consumer Protection Act 1987 or otherwise made or brought against the CONTRACTOR in respect of an alleged defect in the Software to the extent that any such claim is caused by or results from a negligent act or omission of the CUSTOMER in its modification or use of the Software.

K. Intellectual Property Rights Indemnity

The CONTRACTOR shall indemnify the CUSTOMER against any claim that the normal use or possession of the Software supplied infringes the intellectual property rights of any third party provided that the CONTRACTOR is given immediate and complete control of such claim, that the CUSTOMER does not prejudice the CONTRACTOR's defence of such claim, that the CUSTOMER gives the CONTRACTOR all reasonable assistance with such claim and that the claim does not arise as a result of the use of the Software in combination with any software or device not supplied or approved by the CONTRACTOR. The CONTRACTOR shall have the right to replace or change all or any part of the Software in order to avoid any infringement. The foregoing states the entire liability of the CONTRACTOR to the CUSTOMER in respect of the infringement of the intellectual property rights of any third party.

L. Force Majeure

The CONTRACTOR shall not be liable to the CUSTOMER or be deemed to be in breach of contract by reason of any delay in performing, or any failure to perform any of the CONTRACTOR's obligations under a Contract if the delay or failure was due to any cause beyond the CONTRACTOR's reasonable control including, but not limited to, industrial action, war, fire, prohibition or enactment of any kind.

M. Insolvency

If the CUSTOMER, being a company, shall pass a resolution (or suffer an order of the Court to be made) for its winding up, or if a receiver or an administrator shall be appointed, or if a petition for an appointment of an administrator shall be presented in respect of it or, being an individual or partnership, shall suspend payment or propose to enter into any composition with creditors or become unable to pay its debts (or have no reasonable prospect of so doing) or suffer a bankruptcy order, then the CONTRACTOR may, without prejudice to any other right, rescind any Contract, or suspend or cancel delivery of Software or services for which payment in full has not been received and, if Software or services have been delivered and not paid for, the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

N. General

1. Any notices to be served by either party on the other under these Conditions shall be in writing and served at the registered office or principal place of business of that party.
2. No waiver by the CONTRACTOR of any breach of these Conditions or any Contract by the CUSTOMER shall be considered as a waiver of any subsequent breach of the same or any other provision.
3. If any provision of these Conditions or of a Contract is held by any competent authority to be invalid or unenforceable in whole or in part, the validity of the other provisions of these Conditions and of a Contract and the remainder of the provision in question shall not be affected thereby.
4. All Contracts are governed by the laws of England and the English Courts shall have the non-exclusive jurisdiction to resolve any disputes arising out of them.