



## Terms & Conditions of Service

# Digital Orchard IT Limited – Terms & Conditions

## 1. INTERPRETATION

1.1. The following definitions apply to these Conditions.

**Authorised Users:** those employees, agents and independent contractors of the Customer who are authorised by the Customer to use the Services.

**Customer:** means the Customer identified in the first Statement of Work.

**Customer Data:** any information that is provided by the Customer to the Supplier as part of the Customer's use of the Services, including any information derived from such information.

**Data Controller:** has the meaning given to that term in the DPA.

**Data Processor:** has the meaning given to that term in the DPA.

**DPA:** the Data Protection Act 2018.

**Effective Date:** means the last date of signature of the Contract.

**Equipment:** any equipment which the Supplier agrees to purchase for and sell to the Customer as part of the Services as specified in the applicable Statement of Work.

**Intellectual Property Rights:** patents, rights to inventions, copyright and related rights, trade marks, trade names, domain names, rights in goodwill or to sue for passing off, rights in designs, rights in computer software, database rights, moral rights, rights in confidential information and any other intellectual property rights, whether registered or unregistered and all similar or equivalent rights or forms of protection in any part of the world.

**Personal Data:** has the meaning given to that term in the DPA.

**Services:** the IT support, monitoring and management services, to be provided by the Supplier under the Contract as set out in the applicable Statement(s) of Work.

**Software:** any third party software applications which the Supplier agrees to provide as part of the Services.

**Statement of Work:** means the applicable statement of work document setting out the details of the Services to be provided under the Contract, the first of which is set out on the signature page of the Contract.

**Supplier:** Digital Orchard IT Limited, which is a company incorporated in Scotland with company number SC387840 and having its registered office at 10 York Place, Edinburgh, Scotland, EH1 3EP.

**Term:** means the term of this Agreement as described in Condition 2.

## 2. COMMENCEMENT AND DURATION

2.1. This Contract shall commence on the Effective Date and shall continue, unless terminated earlier in accordance with Condition 11 until either party gives to the other party

written notice to terminate. Such notice shall be served no earlier than the first anniversary of the Effective Date and shall expire on the completion of all Statements of Work entered into before the date on which it is served.

2.2. If there are no uncompleted Statements of Work as at the date notice to terminate is served under Condition 2.1, such notice shall terminate this agreement with immediate effect.

2.3. The parties shall not enter into any further Statements of Work after the date on which notice to terminate is served under Condition 2.1.

2.4. The Supplier shall provide the Services from the date specified in the relevant Statement of Work.

## 3. STATEMENT OF WORKS AND SUPPLY OF SERVICES

3.1. Each Statement of Work shall be signed by both parties and be substantially in the form set out in the Statement of Work set out on the signature page of the Contract.

3.2. Each Statement of Work shall be part of the Contract and not form a separate agreement to it.

3.3. The Supplier shall use reasonable endeavors to meet any performance dates for the Services specified in each Statement of Work or notified to the Supplier by the Customer, but such dates shall be estimates only and time for performance by the Supplier shall not be of the essence of this Contract.

3.4. The Supplier shall provide the Services in accordance with any service levels set out in the applicable Statement of Work.

3.5. The Customer shall cooperate with the Supplier in all matters relating to the Services.

3.6. If the Supplier's performance of its obligations under this Contract is prevented or delayed by any act or omission of the Customer, the Supplier shall not be liable for any costs, charges or losses sustained or incurred by the Customer that arise directly or indirectly from such prevention or delay.

3.7. In providing the Services, the Supplier shall:

(i) perform the Services with reasonable care, skill and diligence in accordance with the Supplier's industry, profession or trade; and

(ii) ensure that the Services conform with all descriptions and specifications set out in the applicable Statement of Work.

3.8. Maintenance work will normally be carried out at times agreed between the parties. The Supplier may interrupt the Services outside normal business hours for maintenance provided that it has given the Customer reasonable notice. The Supplier shall at all times endeavour to keep any service interruptions to a minimum.

3.9. The Supplier is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

3.10. The Supplier does not warrant that the Customer's use of the Services will be uninterrupted or error-free; or that the

Services, and/or the information obtained by the Customer through the Services will meet the Customer's requirements.

#### 4. EQUIPMENT

- 4.1. **Quality of Equipment:** The Customer acknowledges that the Supplier is not the manufacturer of any Equipment that may be provided as part of the Services. Where Equipment is provided the Supplier will, to the extent possible, provide the benefit of any manufacturer's guarantee and/or warranty to the Customer in relation to that Equipment. All other warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from this Contract.
- 4.2. **Title to Equipment:** Title in the Equipment shall pass to the Customer on payment to the Supplier of the agreed price for that Equipment.
- 4.3. **Supplier Equipment:** Any materials, hardware and /or equipment provided by the Supplier in relation to the Services which is to remain, as between the Supplier and Customer, owned by the Supplier shall be maintained by the Customer with all due care and in accordance with all reasonable instructions of the Supplier.

#### 5. CUSTOMER OBLIGATIONS

- 5.1. The Customer shall ensure that the Authorised Users use the Services in accordance with the Contract and shall be responsible for any Authorised User's breach of this Contract.
- 5.2. The Customer shall obtain and shall maintain all necessary licences, consents, and permissions necessary for the Supplier, its contractors and agents to perform their obligations under this Contract, including without limitation the Services.
- 5.3. The Customer shall not use the Services in any way which:
- (i) breaches the terms of the Contract or applicable law;
  - (ii) is unlawful or fraudulent;
  - (iii) involves communications of an offensive, abusive, threatening or obscene nature; or
  - (iv) fails to address any reasonable or lawful instructions of the Supplier.

#### 6. SOFTWARE

- 6.1. All Software provided under the Service is provided subject to the terms of the third party licensor/owner of the Software. The Customer shall comply with all such third party terms in relation to the Software, and the Customer shall indemnify and hold the Supplier harmless against any loss or damage which it may suffer or incur as a result of the Customer's breach of such third party terms howsoever arising.

#### 7. PRICE AND PAYMENT

- 7.1. **Pricing Conditions:** The price for Equipment shall be the price set out in the applicable Statement of Work ("**Equipment Price**") and shall be paid prior to delivery to the Customer. The Equipment Price includes costs of transport and installation of the Equipment. The fees for the Services are set out in the applicable Statement of Work (the "**Fees**") and shall be paid monthly in advance. The Seller reserves the right to increase the Fees during the Term, but no more than one increase per Services type in any twelve (12) month period during the Term.

- 7.2. The Supplier reserves the right to increase the Fees if the Customer makes any changes to the Services specified in the applicable Statement of Work.
- 7.3. Failure to make any payment under the Contract on time shall be considered a material breach of the Contract.
- 7.4. The Customer shall make payment as due under the Contract without any deduction, withholding or set-off.
- 7.5. Without prejudice to any other right or remedy that it may have, if the Customer fails to pay the Supplier in accordance with this Condition 7, the Supplier may:-
- (i) charge interest on such sum from the due date for payment at the annual rate of 5% above the base rate from time to time of the Bank of Scotland, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment and the Customer shall pay the interest immediately on demand; and
  - (ii) suspend all Services and supply of Equipment until payment has been made in full.
- 7.6. All sums payable to the Supplier under this Contract shall become due immediately on its termination, despite any other provision. This Condition 7.5 is without prejudice to any right to claim for interest under the law, or any such right under this Contract.
- 7.7. **Exclusions and Additions:** Unless otherwise agreed in writing, the Fees and Equipment Price exclude any applicable taxes. If applicable, Value Added Tax (or any tax or governmental levy imposed in any relevant jurisdiction) shall be added to the Fees and Equipment Price.

#### 8. CUSTOMER DATA

- 8.1. The Supplier shall follow its archiving and security procedures for Customer Data.
- 8.2. The Supplier shall promptly notify the Customer in writing of any loss or damage to the Customer Data. In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for the Supplier to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest backup of such Customer Data. The Supplier shall not be responsible for any loss, destruction, alteration or unauthorised disclosure of Customer Data caused by any third party (except those third parties subcontracted by the Supplier to perform services related to Customer Data maintenance and back-up).
- 8.3. If the Supplier processes any Personal Data on the Customer's behalf when performing its obligations under this Contract, the parties record their intention that the Customer shall be the Data Controller and the Supplier shall be a Data Processor and in any such case:
- (i) the Customer shall ensure that the Customer is entitled to transfer the relevant Personal Data to the Supplier so that the Supplier may lawfully use, process and transfer the Personal Data in accordance with this Contract on the Customer's behalf;
  - (ii) the Customer shall ensure that the relevant third parties have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable data protection legislation;
  - (iii) the Supplier shall process the Personal Data only in accordance with the terms of this Contract and any lawful instructions reasonably given by the Customer from time to time; and
  - (iv) each party shall take appropriate technical and organisational measures against unauthorised or

unlawful processing of the Personal Data or its accidental loss, destruction or damage.

**9. LIMITATION OF LIABILITY.**

- 9.1. The Supplier shall not be liable for any claims, losses, liabilities, expenses or damages arising from:
  - (i) any damage caused by errors or omissions in any information or instructions provided to the Supplier by the Customer in connection with the Services, or any actions taken by the Supplier at the Customer's direction; or
  - (ii) negligence on the part of any person other than the Supplier.
- 9.2. The Supplier shall not be liable for any special, indirect, incidental, consequential or exemplary loss or damage, including loss of profit, business, contracts or goodwill or increased costs of working, whether notice of the likelihood of such damage is given to the Supplier and whether arising, without limitation, through breach of contract, negligence, strict liability in delict, warranty, or statutory duty, which the Customer may sustain in connection with the Contract.
- 9.3. The Supplier shall not be liable for any claims, losses, liabilities, expenses or damages arising from:
  - (i) misuse of the Equipment, including without limitation improper use of the Equipment, use for purposes which are not expressly indicated by the Supplier in writing as suitable for such Equipment;
  - (ii) negligence on the part of any person other than the Supplier;
  - (iii) improper storage or treatment of the Equipment or any part of the Equipment by the Customer or any subsequent user; or
  - (iv) loss or theft of the whole or any part of the Equipment.
- 9.4. Subject to Condition 9.5 below, the Supplier's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, negligence, breach of statutory duty, or otherwise, shall in no circumstances exceed the total amount paid by the Customer for the Services under the applicable Contract during the twelve (12) month period preceding the date on which the claim arose.
- 9.5. Nothing in these Conditions shall limit or exclude the Supplier's liability for (i) personal injury or death resulting from any negligence of the Supplier or its employees, or (ii) any other liability which by law the Supplier cannot limit or exclude by law.

**10. INTELLECTUAL PROPERTY RIGHTS**

- 10.1. All Intellectual Property Rights in the Services and Software are owned by, or validly licensed to, the Supplier. Any Software provided is provided solely in relation to the Customer's use of the Services.
- 10.2. Unless otherwise agreed, where the Supplier carries out any development work as part of the Services ("**Development Services**"), all Intellectual Property Rights of the Supplier arising in relation to such Development Services shall, on payment of the Fees by the Customer, automatically transfer to the Customer without further formality to the extent permitted by applicable law.

**11. TERMINATION**

- 11.1. Without prejudice to any other rights or remedies to which each party may be entitled, a party may terminate the Contract without liability to the other party if:
  - (i) the other party commits a material breach of any term of the Contract which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of fourteen (14) days after being notified in writing to do so;
  - (ii) the other party becomes insolvent or;
  - (iii) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.
- 11.2. On termination or expiry of the Contract:
  - (i) all existing Statements at Work shall terminate automatically;
  - (ii) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of the Works supplied but for which no invoice has been submitted, the Supplier may submit an invoice, which shall be payable immediately on receipt;
- 11.3. Any provision of the Contract that expressly or by implication is intended to come into or continue in force on or after termination of the Contract shall remain in full force and effect.
- 11.4. Termination shall not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination.

**12. GENERAL**

- 12.1. **Confidentiality:** The Customer shall keep confidential and shall not without the prior consent in writing of the Supplier disclose to any third party any technical or commercial information acquired from the Supplier as a result of discussions, negotiations and other communications between the Customer and the Supplier in relation to the Services.
- 12.2. **Entire Agreement:** The Contract shall be governed in all respects by these Conditions. The Supplier shall not be bound by any terms or conditions set out in any other order form, documents or correspondence of the Customer. These Conditions shall supersede and prevail over any other terms and conditions stipulated or referred to by the Customer, and no addition, alteration or substitution of these Conditions will bind the Supplier or form part of any Contract, unless expressly accepted in writing by an authorised officer of the Supplier.
- 12.3. **Force Majeure:** The Supplier shall not be responsible or liable for any loss or damage whether direct, indirect or consequential, arising from any delay or default in the performance of any of the Supplier's obligations in terms of these Conditions where such delay or default arises as a result of any circumstances or conditions beyond the reasonable control of the Supplier. The Supplier shall be entitled to terminate the Contract without liability to the Customer in the event that the ability of the Supplier to deliver the Services is delayed, hindered or prevented by circumstances beyond its reasonable control.
- 12.4. **Waiver of Rights:** No failure or delay by the Supplier to exercise any right or remedy provided under this Contract or by law shall constitute a waiver of that or any other right or remedy, and the single or partial exercise of such right or

remedy shall not prevent or restrict the further exercise of that or any other right or remedy.

- 12.5. **Invalidity:** The invalidity in whole or in part of any of these Conditions shall not affect the validity of any other provision.
- 12.6. **Severability:** Each of these Conditions shall be separate and severable and shall be enforceable accordingly.
- 12.7. **Relationship of Parties:** Nothing in these Conditions and no action taken by the parties pursuant to these Conditions shall constitute or be deemed to constitute a partnership or joint venture between the parties, or shall constitute either party as the agent, employee or representative of the other party. The parties to the Contract are independent parties.
- 12.8. **Third Party Rights:** No term of these Conditions shall be enforceable by a third party (being any person other than the parties and their permitted successors and assignees).
- 12.9. **Notices:** Any notice required to be given, shall be deemed to have been served (i) six (6) business days after time of posting if sent by airmail (ii) forty eight (48) hours after time of posting if sent by first class or prepaid UK post or (iii) at the time of delivery, if delivered personally, by commercial courier or sent by e-mail.

### 13. **GOVERNING LAW AND JURISDICTION**

- 13.1. These Conditions and any other provisions which constitute a Contract between the parties in relation to the supply of the Services shall be governed by and construed in all respects in accordance with the Law of Scotland. The parties hereby submit to the non-exclusive jurisdiction of the Scottish Courts for the determination of any question or dispute between them.
- 13.2. Prior to raising any court proceedings in relation to a dispute relating to the Contract ("**Dispute**") the parties will use reasonable endeavours to resolve the Dispute by such alternative dispute resolution procedure as recommended to the parties by the Centre for Dispute Resolution, provided that the right to issue proceedings is not prejudiced by a delay.