

TERMS AND CONDITIONS OF SALE - BUSINESS TO BUSINESS

- 1 **DEFINITIONS AND INTERPRETATION**
- 1.1 In these terms and conditions:
- 1.2 ***Agreement*** means these terms and conditions;
- 1.3 ***Content*** means any and all information, data and other content which is stored on and/or incorporated into the Products;
- 1.4 ***Customer*** means the person, firm or company whose Order is accepted by Selway Moore Solutions ;
- 1.5 ***Order*** means an order for Product(s) submitted by the Customer to Selway Moore Solutions;
- 1.6 ***Order Acknowledgement*** means Selway Moore Solutions written acknowledgement and acceptance of an Order;
- 1.7 ***Price*** means the price payable by the Customer for the Product(s), as specified in the Order Acknowledgement;
- 1.8 ***Product(s)*** means the product(s) specified in the Order Acknowledgement;
- 1.9 ***SMS*** means Selway Moore Solutions whose registered office is at 169 Basingstoke Road, Reading, Berkshire, RG2 0DY whose registered company number is 3014790 and whose trading address is 169, Basingstoke Road, Reading, Berks, RG2 0DY; and
- 1.10 ***WEEE Directive*** means EC Directive 2002/96/EC on waste electrical and electronic equipment (WEEE) and shall include any applicable laws or regulations which implement the same in England and Wales.
- 1.11 Clause headings are for ease of reference and do not form part of nor shall they affect the interpretation of this Agreement.
- 2 **EFFECT OF PLACING ORDERS**
- 2.1 By placing an Order with SMS, the Customer shall be deemed to have accepted the terms and conditions of this Agreement, which shall govern the supply of the Product(s) to the exclusion of any other terms and conditions (including without limitation those of the Customer).
- 2.2 SMS shall not be bound by any Order unless and until SMS has accepted the Order by issuing an Order Acknowledgement. SMS shall be entitled to accept or refuse any Order in its absolute discretion.
- 2.3 No Order which has been accepted by SMS may be cancelled or varied by the Customer except with the agreement in writing of SMS and on terms that the Customer shall indemnify SMS in full against all losses (including loss of profit), costs, damages, charges and expenses incurred by SMS as a result of such cancellation or variation.
- 3 **PRICES AND PAYMENT**
- 3.1 Unless otherwise agreed in writing, the Price will be the price quoted by SMS at the date of despatch of the Product(s).
- 3.2 Unless otherwise agreed in writing, quotations issued by SMS are not binding and may be withdrawn or revised at any time prior to despatch of the relevant Product(s).
- 3.3 The Price is payable in full without any deduction, withholding or set-off and is exclusive of transport, packaging and insurance charges, installation charges, value added tax, sales taxes and all other applicable taxes and duties, which shall be payable by the Customer in addition to the Price.
- 3.4 Subject to Clauses 3.7, below, SMS shall invoice the Customer for the Price, together with any applicable taxes, duties and/or transport, packaging, insurance and (if applicable) installation charges, on or at any time after delivery of the relevant Product(s). SMS's invoices are due for payment in full within thirty (30) days of the invoice date.
- 3.5 If the Customer disputes all or part of any invoice, the Customer shall inform SMS immediately upon receipt of the relevant invoice. Any undisputed part(s) of the invoice shall remain payable in accordance with this Agreement.
- 3.6 In the event that:
- 3.6.1 the Customer is overdue with any payment hereunder;
- 3.6.2 any step is taken to enforce security over or to obtain possession of the assets of the Customer, including the appointment of an interim receiver, receiver or administrative receiver; or
- 3.6.3 an administration application, administration order or interim order (as each of those terms is defined in the Insolvency Act 1986, as amended by the Enterprise Act 2002 (the "Act")) is made in relation to the Customer; or written notice of intention to appoint an administrator to the Customer is given by any of the persons entitled under the Act to give such notice; or
- 3.6.4 an administrator is appointed to the Customer by any of the persons under the Act entitled to make such an appointment; or
- 3.6.5 the Customer takes or suffers any similar or analogous action in any jurisdiction in consequence of debt; then without prejudice to SMS's other rights or remedies:
- 3.6.6 the Customer shall be liable to pay interest on any overdue amount at an annual rate of 4% above the prevailing base rate of Natwest Bank plc, which interest shall accrue on a daily basis from the date payment becomes due until SMS has received payment of the overdue amount together with all interest that has accrued;
- 3.6.7 SMS shall have the right, at its option, to suspend delivery of the Product(s) for such period as it deems fit; and/or
- 3.6.8 SMS may cancel any outstanding Orders.
- 3.6.9 SMS shall be entitled in its absolute discretion to require full or partial payment of the Price prior to delivery, or the provision of security for payment by the Customer in a form reasonably acceptable to SMS.
- 4 **DELIVERY**
- 4.1 SMS shall use its reasonable endeavours to meet any agreed delivery dates but time of delivery shall not be of the essence.
- 4.2 Unless otherwise agreed in writing with the Customer, SMS shall deliver the Product(s) to the delivery address stated on the Order Acknowledgement or otherwise agreed in writing between the parties.
- 4.3 If the Customer fails to take delivery of the Product(s) when tendered or fails to give SMS adequate delivery instructions prior to the agreed delivery date, SMS may at its option:
- 4.3.1 store the Product(s) until delivery and charge the Customer for the costs of handling, transporting, storing and insuring the Product(s); or
- 4.3.2 sell the Product(s) to an alternative purchaser and charge the Customer for any additional storage and selling expenses together with the difference between the Price and (if lower) the amount paid for the Product(s) by the alternative purchaser.
- 4.4 Where SMS has agreed to install the Product(s) at the delivery address:
- 4.4.1 prior to delivery of the Product(s), the Customer shall at its own expense prepare the location(s) at which the Product(s) are to be installed (the "Installation Location(s)") and shall provide such environmental and operational conditions as are necessary for the efficient working and maintenance of the Product(s);
- 4.4.2 on the delivery date, the Customer shall allow SMS's personnel full and safe access to the Installation Location(s) and shall provide such personnel with such information, facilities, workspace and equipment as is necessary for the installation of the Product(s) (including without limitation information as to the security and health and safety procedures, rules and regulations applicable to contractors working at the delivery address and/or Installation Location(s));
- 4.4.3 SMS shall install the Product(s) at the Installation Location(s). Unless otherwise agreed in writing, all installation services will be carried out during normal business hours (Monday to Friday, 9am to 5.30pm);
- 4.4.4 after installing the Product(s) at the Installation Location(s), SMS shall submit the Product(s) to SMS's standard installation tests (the "Installation Tests") to ensure that the Product(s) are in full working order. One or more authorised representative(s) of the Customer shall attend the Installation Tests. If the Product(s) fail the Installation Tests, SMS shall within a reasonable time rectify or replace the relevant Product(s) so that they are capable of passing the Installation Tests and shall perform repeat Installation Tests as necessary. Once the Product(s) have successfully passed the Installation Tests, the Product(s) shall be deemed accepted by the Customer and the Customer shall, if required by SMS, sign an acceptance certificate confirming the same.
- 4.5 The Customer shall reimburse SMS for all additional costs and expenses incurred by SMS in connection with the installation of the Product(s) as a result of any delay or failure by the Customer in performing its obligations set out in Clause 4.4.
- 5 **TITLE AND RISK**
- 5.1 Unless otherwise agreed between the parties in writing, risk in the Product(s) shall pass to the Customer upon delivery in accordance with Clause 4.2 or, where the Customer is arranging the transportation of the Product(s), upon delivery of the Product(s) to the carrier nominated by the Customer.
- 5.2 Notwithstanding delivery and the passing of risk in the Product(s), title to the Product(s) shall only pass to the Customer when SMS has received in full (in cash or cleared funds) all sums due to it in respect of the Product(s) and all other sums which are or may become due to SMS from the Customer on any account.
- 5.3 Until such time as title in the Product(s) has passed to the Customer, the Customer shall hold the Product(s) on a fiduciary basis as SMS's bailee, shall carefully store the Product(s) in such a way as to enable them to be identified as the property of SMS and shall keep them insured at its own expense against all loss or damage howsoever caused.
- 5.4 SMS reserves the immediate right of re-possession of any Product(s) to which SMS has retained title hereunder, exercisable at any time after delivery, and the Customer hereby grants to SMS's servants and agents an irrevocable right to enter without prior written notice upon all or any premises where the Product(s) are stored for this purpose.
- 5.5 Nothing in this Clause 5 shall prevent SMS from suing the Customer to recover the Price when due.
- 6 **RETURNS**
- 6.1 With the exception of Clause 6.6, which applies to all Products, this Clause 6 sets out the returns policy of SMS in relation to Product(s) that SMS has not agreed to install.
- 6.2 The Customer shall promptly examine the Product(s) as soon as they are delivered.
- 6.3 Provided that the Customer notifies SMS within 14 days of the delivery date for the relevant Product(s) then, subject to Clause 6.3, the Customer may return to SMS any Product(s) (or any part thereof) which is:
- 6.3.1 damaged in transit (unless the Customer is responsible for transport);
- 6.3.2 incorrectly shipped (unless this is due to incorrect ordering by the Customer); or
- 6.3.3 "Dead on Arrival", whereby the Product(s) do not function substantially in accordance with the manufacturer's specification.
- 6.4 The Customer shall be deemed to have accepted the Product(s) if it fails to notify SMS of any of the matters referred to in Clause 6.2 within 14 days of delivery of such Product(s).
- 6.5 Any notice sent pursuant to Clause 6.2 shall be sent to SMS at Selway Moore Solutions, 169, Basingstoke Road, Reading, Berkshire, RG2 0DY, for the attention of the Returns Department. Upon receipt of any such notice, SMS shall, if it consents to the return of the relevant Product(s), issue the Customer with an "RNA" number authorising the return of such Product(s). The RNA number will remain valid for a period of 14 days from the date of issue. SMS shall not be obliged to accept the return of any Product(s) in respect of which no RNA number has been obtained.
- 6.5 The Customer shall return all Products at the Customer's own risk, carriage paid and appropriately insured. All Products returned must be in their original condition and packaging, unmarked and complete.
- 6.6 The acceptance by SMS of Product returns where the Product(s) have been incorrectly ordered by Customer will be at the sole discretion of SMS. In the event that such Product(s) are accepted, SMS reserves the right to levy a restocking fee or a sum representing SMS's disposal costs.
- 6.7 Provided that the Customer has complied with this Clause 6 and SMS agrees that the returned Product(s) are damaged in transit, incorrectly shipped or "Dead on Arrival", then subject to the terms of this Agreement, SMS shall refund to the Customer all reasonable costs incurred in returning the relevant Product(s) to SMS and shall either rectify or replace the relevant Product(s) (or part(s) thereof) free of charge or, at SMS's option, credit the Customer in full with the Price (or part thereof) attributable to such Product(s).
- 7 **SOFTWARE**
- 7.1 To the extent that the Product(s) comprise or include any software, such software and all copyright and other intellectual property rights therein shall at all times remain the exclusive property of the third party licensor of such software, and the Customer shall only acquire title to the media on which the software is delivered. With effect from delivery to the Customer, SMS shall procure for the Customer a non-exclusive, non-transferable licence to use such software subject to any terms and conditions imposed by the relevant third party licensor.
- 8 **WARRANTIES**
- 8.1 SMS warrants that, subject to Clause 5.2 above, title to the Product(s) (but not any software comprised therein) will pass to the Customer free from any lien, charge or encumbrance.
- 8.2 To the extent permitted by the manufacturer or original supplier of the Product(s) and any applicable law, SMS hereby assigns to the Customer any and all end user warranties given by the manufacturer or original supplier of the Product(s).
- 8.3 With respect to second-user Product(s) that are no longer covered by manufacturer's or supplier's warranties, a 30 day "return to base" warranty shall be available to the Customer in addition to the rights set out in Clause 6 above, such that if any Product(s) within 30 days of delivery fail to function substantially in accordance with the manufacturer's specification, the Customer may return the relevant Product(s) to SMS at Selway Moore Solutions, 169, Basingstoke Road, Reading, Berks, RG2 0DY and, provided such failure is due to a problem with the Product(s) (and not due to the Customer's incorrect use of the Product(s) or to problems with equipment not supplied by SMS) SMS will rectify the problem free of charge.
- 8.4 The return of all Product(s) to SML shall be governed by the "SMS Returns Policy", a copy of which shall be provided by SMS to the Client upon the Client's request.
- 9 **LIABILITY**
- 9.1 Subject to Clauses 9.2 and 9.3, SMS's maximum aggregate liability under or in connection with this Agreement, whether in contract, tort (including negligence) or otherwise, shall in no circumstances exceed 125% of the Price payable hereunder.
- 9.2 Nothing in this Agreement shall exclude or in any way limit SMS's liability for fraud, or for death or personal injury caused by its negligence, or any other liability to the extent the same may not be excluded or limited as a matter of law.
- 9.3 Subject to Clause 9.2, SMS shall not be liable under this Agreement for any loss of actual or anticipated income or profits, loss of contracts or for any special, indirect or consequential loss or damage of any kind howsoever arising and whether caused by tort (including negligence), breach of contract or otherwise, whether or not such loss or damage is foreseeable, foreseen or known.
- 9.4 Where SMS has not agreed to remove all Content from the Product(s) prior to their supply to the Customer hereunder, the Customer acknowledges that SMS takes no responsibility for and shall not be liable to the Customer for any claims, actions, liabilities, damages, losses, costs or expenses suffered by the Customer or any third party arising out of or in connection with the Content and the Customer shall be solely responsible for ensuring that such Content is removed from the Products prior to the use of such Products by the Customer, its employees, agents, contractors and/or any third parties authorised by the Customer to use the same.
- 9.5 This Agreement sets forth the full extent of SMS's obligations and liabilities arising out of or in connection with this Agreement, and there are no conditions, warranties, representations or terms, express or implied, that are binding on SML except as specifically stated in this Agreement. Any condition, warranty, representation or term concerning the supply of the Product(s) which might otherwise be implied into or incorporated within this Agreement, whether by statute, common law or otherwise, is hereby excluded.
- 9.6 SMS shall not be responsible for any delay in performing or failure to perform any of its obligations hereunder if and to the extent that such delay or failure has been caused by any delay, act or omission of the Customer.
- 10 **WEEE DIRECTIVE COMPLIANCE**
- 10.1 The Customer hereby acknowledges that SMS may be required to finance the costs of collection, treatment, recovery and disposal of certain Products supplied to the Customer hereunder pursuant to the WEEE Directive. The Customer shall be liable for and shall indemnify SMS against any and all claims, actions, liabilities, losses, damages, costs and expenses (including legal expenses) incurred by SMS in complying with the WEEE Directive in respect of such Products supplied hereunder.
- 11 **EXPORTS**
- 11.1 In the event that the Customer is to export the Product(s) outside the UK:-
- 11.2 The Customer shall be solely responsible for complying with all applicable laws and regulations and for obtaining any requisite export/import licences and authorisations;
- 11.3 The Customer shall indemnify SMS in respect of any and all costs incurred by SMS arising out of or in connection with the unauthorised export of any of such Product(s); and
- 11.4 The Customer acknowledges that any warranties applicable to such Product(s) may be varied or excluded.
- 12 **FORCE MAJEURE**
- 12.1 SMS shall not be liable for any delay in fulfilling or failure to fulfil any of its obligations under this Agreement to the extent that such delay or failure is caused by any cause or circumstance beyond SMS's reasonable control (including but not limited to the delay or default of SMS's suppliers) (an "event of force majeure").
- 12.2 SMS shall notify the Customer if any event of force majeure arises and the date(s) for performance of its affected obligation(s) shall be postponed for so long as is made necessary by the event of force majeure. If any event of force majeure continues for a period of or exceeding three months, either party shall have the right to cancel the affected Order (or part thereof) forthwith on written notice to the other party.
- 13 **NOTICES**
- 13.1 All notices and other communications required or permitted to be served or given hereunder shall be in writing and sent by first class post, courier or facsimile to such address as either party may notify to the other from time to time for such purpose.
- 14 **LAW AND JURISDICTION**
- 14.1 The construction, validity and performance of this Agreement shall be governed by the laws of England and Wales and the parties submit to the exclusive jurisdiction of the courts of England and Wales to resolve any dispute between them, provided that SMS shall have the right, as plaintiff, to initiate proceedings against the Customer in any other court of competent jurisdiction.
- 15 **GENERAL**
- 15.1 Any failure by SMS to enforce any term of or right arising pursuant to this Agreement does not constitute a waiver of such term or right and shall in no way affect SMS's right later to enforce or exercise the term or right.
- 15.2 The invalidity or unenforceability of any term of or right arising pursuant to this Agreement shall not adversely affect the validity or enforceability of the remaining terms and rights.
- 15.3 This Agreement constitutes the entire agreement and understanding between the parties with respect to its subject matter and supersedes any prior agreement understanding or arrangement between the parties whether oral or in writing. No representation, undertaking or promise shall be taken to have been given or be implied from anything said or written in communications between the parties prior to this Agreement except as set out in this Agreement. Neither party shall have any remedy in respect of any untrue statement made to it upon which it has relied in entering into this Agreement (unless such untrue statement was made fraudulently) and that party's only remedies shall be for breach of contract as provided in this Agreement.
- 15.4 No variation to the scope or terms of this Agreement shall take effect unless and until agreed in writing and executed by duly authorised representatives of SMS and the Customer.
- 15.5 A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.
- 15.6 SMS shall be entitled to assign or otherwise transfer, in whole or in part, any of its rights or obligations under this Agreement to any third party without recourse to the Customer.