

Terms & Conditions

The customer's attention is drawn in particular to the provisions of clause 13.

1. Interpretation

The following definitions and rules of interpretation apply in this agreement.

1.1 Definitions:

Business Day: a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.

Commencement Date: has the meaning given in clause 2.2.

Conditions: these terms and conditions as amended from time to time in accordance with clause 15.3.

Contract: the contract between Malary and the Customer for the supply of Goods and/or Services in accordance with these Conditions.

Customer: the person or firm who purchases the Goods and/or Services from Malary.

Deliverables: any deliverables set out in the quotation produced by Malary for the Customer.

Delivery Location: has the meaning given in clause 4.2.

Force Majeure Event: has the meaning given to it in clause 14.

Goods: the goods (or any part of them) set out in the Goods Specification.

Goods Specification: any description or specification for the Goods that is agreed in writing by the Customer and Malary.

Order: the Customer's order for the supply of Goods and/or Services, as set out in the Customer's purchase order form or the Customer's written acceptance of Malary's quotation, as the case may be.

Services: the services, including the Deliverables, supplied by Malary to the Customer as set out in the Service Specification.

Service Specification: the description or specification for the Services provided in writing by Malary to the Customer.

Malary: Malary Limited (registered in England and Wales with company number 05700984).

Malary Materials: has the meaning given in clause 8.1(i).

1.2 Interpretation:



- (a) A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- (b) A reference to a party includes its personal representatives, successors and permitted assigns.
- (c) A reference to a statute or statutory provision is a reference to it as amended or re-enacted. A reference to a statute or statutory provision includes all subordinate legislation made under that statute or statutory provision.
- (d) Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- (e) a reference to **writing** or **written** includes faxes and emails.

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. The Customer is responsible for ensuring that the terms of the Order submitted by the Customer are complete and accurate.
- 2.2 The Order shall only be deemed to be accepted when Malary issues written acceptance of the Order at which point and on which date the Contract shall come into existence (**Commencement Date**).
- 2.3 Any samples, drawings, descriptive matter or advertising issued by Malary and any descriptions of the Goods or illustrations or descriptions of the Services contained on Malary's website are produced 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.
- 2.4 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.
- 2.5 Any quotation given by Malary shall not constitute an offer, and is only valid for a period of 30 days from its date of issue.
- 2.6 All of these Conditions shall apply to the supply of both Goods and Services except where application to one or the other is specified.

3. Goods

- 3.1 The Goods are described in the Goods Specification.



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3.2 Malary reserves the right to amend the description in the Goods Specification if required by any applicable statutory or regulatory requirement, and Malary shall notify the Customer in any such event.

4. Delivery of Goods

4.1 Malary shall ensure that:

- (a) each delivery of the Goods is accompanied by a delivery note that shows the description and quantity of the Goods delivered; and
- (b) if Malary requires the Customer to return any packaging materials to Malary, that fact is clearly stated on the delivery note. The Customer shall make any such packaging materials available for collection at such times as Malary shall reasonably request. Returns of packaging materials shall be at Malary's expense.

4.2 Malary shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (**Delivery Location**) at such time between 9am and 5pm on a Business Day as Malary notifies the Customer in writing at least one Business Day before the delivery or such other time as the parties agree (**Delivery Time**).

4.3 Delivery is completed on the completion of unloading of the Goods at the Delivery Location.

4.4 Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. Malary shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide Malary with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

4.5 If Malary 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. Malary 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 Malary with adequate delivery instructions for the Goods or any other instructions that are relevant to the supply of the Goods.

4.6 If the Customer fails to take delivery of the Goods within two hours of the Delivery Time, then, except where such failure or delay is caused by a Force Majeure Event or Malary's failure to comply with its obligations under the Contract:

- (a) delivery of the Goods shall be deemed to have been completed at the Delivery Time; and
- (b) Malary may:



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- (i) store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including transportation costs and insurance); or, and at any time after Malary has elected to store the Goods
 - (ii) resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage, transportation and selling costs, account to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.
- 4.7 If Malary delivers up to and including 10% more or less than the quantity of Goods ordered the Customer may not reject them, but on receipt of notice from the Customer within 5 Business Days of the Delivery Time that the wrong quantity of Goods was delivered, a pro rata adjustment shall be made to the Order invoice for the Goods.
- 4.8 Malary may deliver the Goods by instalments, which shall be invoiced and paid for separately. 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 Malary warrants that on delivery the Goods shall:
- (a) conform in all material respects with their description and any applicable Goods Specification;
 - (b) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
 - (c) be fit for any purpose held out by Malary.
- 5.2 Subject to clause 5.3, if the Customer gives notice in writing to Malary within a reasonable time of discovery that some or all of the Goods do not comply with the warranty set out in clause 5.1:
- (a) the Customer shall give Malary a reasonable opportunity of examine such Goods; and
 - (b) if accepted by Malary, it shall, at its option, replace the defective Goods or refund the price of the defective Goods in full.
- 5.3 Malary shall not be liable for the Goods' failure to comply with the warranty set out in clause 5.1 in any of the following events:
- (a) the Customer makes any further use of such Goods after giving notice in accordance with clause 5.2;
 - (b) the defect arises because the Customer failed to follow Malary's oral or written instructions as to the storage, commissioning, installation, use and maintenance of the Goods or (if there are none) good trade practice regarding the same; or



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- (c) the defect arises as a result of the Customer's wilful damage, negligence, or abnormal storage or working conditions.

5.4 Except as provided in this clause 5, Malary shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 5.1.

5.5 The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 are, to the fullest extent permitted by law, excluded from the Contract.

5.6 These Conditions shall apply to any repaired or replacement Goods supplied by Malary.

6. Risk

6.1 The risk in the Goods shall pass to the Customer on completion of delivery.

7. Supply of Services

7.1 Malary shall supply the Services to the Customer in accordance with the Service Specification in all material respects.

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

7.3 Malary reserves the right to amend the Service Specification if necessary to comply with any applicable law or regulatory requirement, or if the amendment will not materially affect the nature or quality of the Services, and Malary shall notify the Customer in any such event.

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

8. Customer's obligations

8.1 The Customer shall:

- (a) ensure that the terms of the Order and any information it provides in the Service Specification and the Goods Specification are complete and accurate;
- (b) co-operate with Malary in all matters relating to the Services;
- (c) provide Malary, its employees, agents, consultants and subcontractors, with access to the Customer's premises, office accommodation and other facilities as reasonably required by Malary to provide the Services;



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- (d) provide Malary with such information and materials as Malary may reasonably require in order to supply the Services, and ensure that such information is complete and accurate in all material respects;
- (e) prepare the Customer's premises for the supply of the Services;
- (f) 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, save to the extent they are included in the Service Specification;
- (g) comply with all applicable laws, including health and safety laws;
- (h) not to mix any waste and notify Malary of any mixed wastes immediately;
- (i) keep all materials, equipment, documents and other property of Malary (**Malary Materials**) at the Customer's premises in safe custody at its own risk, maintain Malary Materials in good condition and not to use them (save as directed by Malary) until they are returned to Malary, and not dispose of or use Malary Materials other than in accordance with Malary's written instructions or authorisation; and
- (j) comply with any additional obligations as set out in the Service Specification and the Goods Specification.

8.2 If Malary's performance of any of its obligations under the Contract is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (**Customer Default**):

- (a) without limiting or affecting any other right or remedy available to it, Malary shall have the right to suspend 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 in each case to the extent the Customer Default prevents or delays Malary's performance of any of its obligations;
- (b) Malary shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from Malary's failure or delay to perform any of its obligations as set out in this clause 8.2; and
- (c) the Customer shall reimburse Malary on written demand for any costs or losses sustained or incurred by Malary 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 in the Order, the price set out in the latest price list Malary has notified to the Customer as at the date of the Order.



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- 9.2 The charges for Services shall be calculated either on a fixed charge stated in the Order or, if no fixed charge is stated, on a time and materials basis:
- (a) the charges shall be calculated in accordance with Malary's daily or hourly fee rates, as set out in the Order or, if no rate is quoted in the Order, the last rates Malary notified in writing to the Customer as at the date of the Order;
 - (b) Malary's daily fee rates for each individual person are calculated on the basis of the number of hours per day and working hours (**Hours**) referred to in the Order or, if no Hours are quoted in the Order, the last Hours Malary notified in writing to the Customer as at the date of the Order;
 - (c) Malary shall be entitled to charge an overtime rates as agreed between the parties (or the daily or hourly rate, if no overtime rate is agreed) if Malary is instructed to conduct Services outside the hours referred to in clause 9.2**(b)**.
- 9.3 Malary reserves the right to increase the price of the Goods, by giving notice to the Customer at any time before delivery, to reflect any increase in the cost of the Goods to Malary that is due to:
- (a) any factor beyond Malary's control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials 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 Malary adequate or accurate information or instructions in respect of the Goods.
- 9.4 Malary may invoice the Customer for the Goods on or at any time after completion of delivery. In respect of Services, Malary shall invoice the Customer on completion of the Services or at such intervals as are provided for in the Order.
- 9.5 The Customer shall pay each invoice in full and in cleared funds within 30 days of the date of the invoice or in accordance with any credit terms agreed by Malary and confirmed in writing to the Customer. Payment shall be made to the bank account nominated in writing by Malary. Time for payment is of the essence.
- 9.6 All amounts payable by the Customer under the Contract are exclusive of:
- (a) amounts in respect of value added tax (**VAT**), which the Customer shall additionally be liable to pay to Malary at the prevailing rate, subject to the receipt of a valid VAT invoice; and
 - (b) amounts in respect of landfill tax, which the Customer shall additionally be liable to pay to Malary at the prevailing rate.



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- 9.7 All amounts payable by the Customer under the Contract are inclusive of the costs and charges of packaging, insurance and transport of the Goods and the cost of services provided by third parties and required by Malary for the performance of the Services, and for the cost of any materials, save where those costs and charges are identified in the Order, in which case they shall be invoiced to the Customer.
- 9.8 If the Customer fails to make a payment due to Malary under the Contract by the due date, then, without limiting Malary's remedies under clause 11 (Termination), the Customer shall pay interest on the overdue sum from the due date until payment of the overdue sum, whether before or after judgment. Interest under this clause 9.8 will accrue each day at 4% a year above the Bank of England's base rate from time to time, but at 4% a year for any period when that base rate is below 0%.
- 9.9 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding (except for any deduction or withholding required by law). Malary may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it.

10. Confidentiality

- 10.1 Each party undertakes that it shall not at any time disclose to any person any confidential information concerning the business, affairs, customers, clients or Malary of the other party, except as permitted by clause 10.2.
- 10.2 Each party may disclose the other party's confidential information:
- (a) to its employees, officers, representatives, subcontractors or advisers who need to know such information for the purposes of carrying out the party's obligations under the Contract. Each party shall ensure that its employees, officers, representatives, subcontractors or advisers to whom it discloses the other party's confidential information comply with this clause 10; and
 - (b) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- 10.3 Neither party shall use the other party's confidential information for any purpose other than to perform its obligations under the Contract.

11. Termination

- 11.1 Without limiting its other rights or remedies, Malary may terminate this Contract with immediate effect by giving written notice to the Customer if:



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- (a) the Customer commits a material breach of any term of the Contract and (if such a breach is remediable) fails to remedy that breach within 14 days of that party being notified in writing to do so;
- (b) the Customer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;
- (c) the Customer suspends, threatens to suspend, ceases or threatens to cease to carry on all or a substantial part of its business; or
- (d) the Customer's financial position deteriorates to such an extent that in Malary's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.

11.2 Without limiting its other rights or remedies, Malary may suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between the Customer and Malary if the Customer fails to pay any amount due under the Contract on the due date for payment, the Customer becomes subject to any of the events listed in clause 11.1(b) to clause 11.1(d), or Malary reasonably believes that the Customer is about to become subject to any of them.

11.3 Without limiting its other rights or remedies, Malary may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under the Contract on the due date for payment.

12. Consequences of termination

12.1 On termination of the Contract:

- (a) the Customer shall immediately pay to Malary all of Malary's outstanding unpaid invoices and interest and, in respect of Services and Goods supplied but for which no invoice has been submitted, Malary shall submit an invoice, which shall be payable by the Customer immediately on receipt;
- (b) the Customer shall return all of Malary Materials and any Deliverables or Goods which have not been fully paid for. If the Customer fails to do so, then Malary 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.



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- 12.2 Termination of the Contract shall not affect any rights, remedies, obligations and 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.
- 12.3 Any provision of the Contract that expressly or by implication is intended to have effect after termination shall continue in full force and effect.
- 13. Limitation of liability: THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CLAUSE**
- 13.1 Nothing in these Conditions shall limit or exclude Malary's liability for:
- (a) death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);
 - (b) fraud or fraudulent misrepresentation;
 - (c) breach of the terms implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession); or
 - (d) defective products under the Consumer Protection Act 1987; or
 - (e) any matter in respect of which it would be unlawful for Malary to exclude or restrict liability.
- 13.2 Subject to clause 13.1:
- (a) Malary shall under no circumstances whatsoever 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
 - (b) Malary's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the total charges in the contract year in which the breaches occurred.



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14. Force majeure

Neither party shall be in breach of the Contract nor liable for delay in performing or failure to perform, any of its obligations under the Contract if such delay or failure result from events, circumstances or causes beyond its reasonable control (a **Force Majeure Event**). If the period of delay or non-performance continues for 4 weeks, the party not affected may terminate this Contract by giving 7 days written notice to the affected party.

15. General

15.1 Assignment and other dealings.

- (a) Malary may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract.
- (b) The Customer may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights or obligations under the Contract without the prior written consent of Malary.

15.2 Entire agreement.

- (a) This Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.
- (b) Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

15.3 Variation. No variation of this Contract shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

15.4 Waiver. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the 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 Severance. 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.



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15.6 Notices.

- (a) Any notice or other communication given to a party under or in connection with the 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, sent by pre-paid first class post or other next working day delivery service, commercial courier, or fax or email.
- (b) A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 15.6(a); 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 or email, one Business Day after transmission.
- (c) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

15.7 Third party rights. No one other than a party to this Contract and their permitted assignees shall have any right to enforce any of its terms.

15.8 Governing law. The Contract, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, 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 (including non-contractual disputes or claims) arising out of or in connection with the Contract or its subject matter or formation.



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