

MAINTENANCE AGREEMENT & SOFTWARE LICENCE



Cleartech Communications

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MAINTENANCE AGREEMENT AND SOFTWARE LICENCE – TERMS & CONDITIONS



1. INTERPRETATION

1.1 In these Terms:
Business Days: a day other than a Saturday, Sunday or public holiday in England when banks in London are open;
Commencement Date: means the date specified overleaf as the commencement date;
Contract: means the contract for the provision of Maintenance Services incorporating these Terms;
Customer: means the person named overleaf;
Documentation: means the operating manuals, user instruction manuals, technical literature and all other related materials supplied by the Supplier in relation to the use of the Software;
Equipment: means the equipment detailed overleaf and all internal cabling up to the network test termination point or other demarcation point;
Fair Usage Policy: the Supplier's fair usage policy set out on the Supplier's Website;
Group: in relation to the Supplier means Cleartech plc, any company of which Cleartech plc is a Subsidiary (its holding company) and any other Subsidiaries of any such holding Company;
Intellectual Property Rights: patents, utility models, rights to inventions, copyright and neighbouring and related rights, trade marks and service marks, business names and domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off or unfair competition, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets), 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;
Licence: the Software licence granted under condition 3 of these Terms;
Licensed Users: the employees and agents of the Customer who use the Equipment;
Maintenance Release: a release of software which corrects faults, adds functionality or otherwise amends or upgrades the Software, but does not constitute a new version of the Software;
Maintenance Services: means the On-site Warranty Services and the Software Maintenance Services;
Minimum Term: the agreed minimum term for the provision of the Maintenance Services is 7 years (84 months) unless otherwise agreed in writing;
Non-Critical Fault: means any reproducible fault in the Software other than a fault which substantially hinders or prevents the Customer from using a material part of the functionality of the Software in question;
On-site Warranty Services: means the hardware fault rectification service described in condition 5 below;
Privacy Policy: the Supplier's privacy policy available on the Supplier's Website;
Software: the operating systems, features and applications contained on the Equipment or in the cloud and used on the Equipment and all subsequent amendments and updates to, or new versions of, such Software as may be provided under clause 3 of these Terms;
Software Maintenance Services: means the software maintenance services described in condition 6 below;
Subsidiary: in relation to a company wherever incorporated (a holding company) means a "subsidiary" as defined in section 1159 of the Companies Act 2006 and any other company which is a subsidiary (as so defined) of a company which is itself a subsidiary of such holding company;
Supplier: means Cleartech Communications, a company registered in England and Wales with company number of 12059279 and whose registered office is at, Chesham, St. George's Square, Bolton, BL1 2HB;
Supplier's Website: www.cleartechcomms.co.uk;
Terms: means these terms and conditions;
Third Party Licence: means any open-source software licences relating to the Software, including the general public licence (if applicable), and any proprietary third-party software licences;
Any reference to any legislative provision is a reference to that provision as amended, re-enacted or extended at the relevant time.
Headings are for convenience only and do not affect interpretation.

2. SUPPLY OF MAINTENANCE SERVICES AND LICENCE

2.1 In consideration of the payment by the Customer of an annual service charge in accordance with condition 9 the Supplier undertakes to provide the Maintenance Services and the Licence in accordance with these Terms.
2.2 These Terms may be varied by the Supplier if the Supplier deems such variation to be necessary to comply with any statute, regulation or British Standards Institute requirement.
2.3 The Maintenance Services and the Licence will commence on the Commencement Date and shall continue, unless terminated earlier in accordance with condition 13, for the Minimum Term. The term of the Contract shall automatically extend for 12 months (Extended Term) at the end of the Minimum Term and at the end of each Extended Term, unless a party gives written notice to the other party no later than 90 days before the end of the Minimum Term or the relevant Extended Term, to terminate the Contract at the end of the Minimum Term or the relevant Extended Term, as the case may be.

3. SOFTWARE LICENCE AND DOCUMENTATION

3.1 The Supplier grants, subject to these Terms, to the Customer the non-exclusive, non-transferable right to use the Software on the Equipment and the Documentation for its business purposes (Licensed Purpose).
3.2 The Software may be used only by Licensed Users, except as follows:
3.2.1 the Software may be used on any replacement for all or any part of the Equipment;
3.2.2 the Licence may, with the prior written consent of the Supplier, be extended to additional Licensed Users, provided that any appropriate additional fee is paid to the Supplier for such use;
3.2.3 if the Equipment becomes inoperable for any reason, the Software may be temporarily used on backup equipment until the Equipment is repaired, and the Customer may use the Software for the purpose of testing whether any such backup equipment is suitable for use while the Equipment is inoperable.
3.3 The Customer shall comply with the Third-Party Licences and shall indemnify and hold the Supplier harmless against any loss of damage, which it may suffer or incur as a result of the Customer's breach of such terms howsoever arising. The Supplier may treat the Customer's breach of any Third-Party Licence as a breach of this Contract.
3.4 The Customer shall not give access to the Software through any network of computers to users who are not employees or agents of the Customer.
3.5 The Supplier will use reasonable endeavours to enable the Customer to use the Software 24 hours a day 7 days a week except for planned and/or unscheduled maintenance provided the Supplier has used reasonable endeavours to give the Customer at least six business hours' notice in advance of such maintenance.
3.6 The Customer may use the Software with other software.
3.7 The Customer may not make adaptations or variations of the Software without the prior consent of the Supplier or disassemble, decompile, reverse translate or in any other manner decode the Software, except as permitted by law.

4. OWNERSHIP

4.1 The Intellectual Property Rights in the Software (other than the Third-Party Software) are, and shall remain, the property of the Supplier, and the Supplier reserves the right to grant a licence to use the Software to any other party or parties.
4.2 The Software and the Documentation are proprietary to the Supplier (or the appropriate third-party rights owner(s)) and the Customer acquires no rights in or to the Software or the Documentation other than those expressly granted by these Terms.
4.3 The Customer shall use reasonable endeavours to prevent any infringement of the Supplier's Intellectual Property Rights in the Software and shall promptly report to the Supplier any such infringement that comes to its attention. In particular, the Customer shall ensure that each Licensed User, before starting to use the Software:
4.3.1 is made aware that the Software is proprietary to the Supplier and that it may only be used and copied in accordance with these Terms;
4.3.2 (a) consents to the Supplier's Privacy Policy;
4.3.3 implement suitable disciplinary procedures for employees who make unauthorised use or copies of the Software; and
4.3.3 not permit third parties to have access to the Software without the prior written consent of the Supplier, who may require that such third party executes a written confidentiality agreement and accepts the Supplier's Privacy Policy before being given access to the Software.

5. ON-SITE WARRANTY SERVICES

5.1 On-Site Warranty Services shall comprise:
5.1.1 upon receipt of a request from a Customer (which shall be made by telephone, email or via the Supplier's Website) to the inspection testing and diagnosing (by attendance on-site or remotely) by the Supplier or any fault reporting in an item of Equipment; and
5.1.2 the carrying out by the Supplier of such repairs, replacement of parts or adjustment as the Supplier shall deem necessary to remedy the said fault.
5.2 On-Site Warranty Services will be carried out by duly qualified engineers.

6. SOFTWARE MAINTENANCE SERVICES

6.1 The Software Maintenance Services shall comprise:
6.1.1 a telephone helpdesk to provide first line technical support;
6.1.2 remote diagnosis and where possible, correct faults using software management software; and
6.1.3 second line on-site technical support (the number of hours in any month being dependent on the service level chosen by the Customer).
6.2 If additional on-site support is required in any month it may be provided by the Supplier at its option at its then standard rates (as varied from time to time).
6.3 The Supplier will from time to time provide Maintenance Releases or updated versions of the Software. Where a Non-Critical Fault is to be corrected in a forthcoming Maintenance Release, then for a reasonable period before the issue of such Maintenance Release, the Supplier may decline to provide assistance in respect of that Non-Critical Fault.
7. **TIMES FOR ON-SITE WARRANTY SERVICES**
7.1 Unless prevented by circumstances beyond the Supplier's control, the Supplier will rectify faults during the following hours as based on the agreed level of service detailed overleaf:
7.1.1 LEVEL 1: Between the hours of 9.00am and 5.00pm Mondays to Fridays excluding weekends and public holidays;
7.1.2 LEVEL 2: Between the hours of 9.00am and 5.00pm Mondays and Fridays excluding weekends and public holidays;
7.1.3 LEVEL 3: 24 hours a day including weekends and public holidays.
7.2 The Supplier will use its reasonable endeavours to ensure that response times to the Customer's notification of a fault are not more than:
7.2.1 8 working hours if the Equipment has failed completely; or
7.2.2 16 working hours if the Equipment has failed partially.
7.3 Response times shall commence from the date and time the Supplier receives a request from the Customer.

8. EXCLUSIONS

8.1 The Supplier shall have no obligations or liability whatsoever under the Contract:
8.1.1 in respect of any defect arising from willful damage, negligence (including improper storage), abnormal working conditions, failure to follow the Supplier's instructions (whether oral or in writing), misuse or alteration or repair of the Equipment without the Supplier's approval;
8.1.2 if any sum owing by the Customer to the Supplier whether under these Terms or otherwise has not been paid;
8.1.3 If loss is suffered by the Customer because the Equipment fails to perform to its specifications and the failure is caused by faults in the service provided by the network provider;
8.1.4 In respect of any delay in the execution of any repair;
8.1.5 In respect of remedying defects in electricity or network supply to the Equipment; defects caused by failures or surges of electrical power; failure of the Equipment due to changes in the electrical supply service or the public network;
8.1.6 In respect of the Software Maintenance Services where faults arise from:
(a) Misuse, incorrect use or damage to the Software from whatever cause (other than an act or omission by the Supplier), including failure or fluctuation of electrical power;
(b) Failure to maintain the necessary environmental conditions for use of the Software;
(c) Use of the Software in combination with any equipment or software not provided by the Supplier or approved by the Supplier or any fault in any such equipment or software;
(d) Relocation of the Software by any person other than the Supplier or a person acting under the Supplier's instructions;
(e) Any breach of the Customer's obligations under the Contract however arising or having the Software maintained by a third party;
(f) Operator error.
8.1.7 In respect of the Software Maintenance Services unless the Customer is using the most recent version of the Software.

9. CHARGES AND FAIR USAGE

9.1 The annual service charge for the Maintenance Services and the Licence (as specified overleaf) is payable in advance at such intervals as the Supplier shall determine. Payment is due on presentation of an invoice by the Supplier and must be made by direct debit.
9.2 The Supplier reserves the right to submit invoices to the Customer via email.
9.3 Where payment is outstanding for more than 30 days in respect of any invoice due under the Contract the Supplier may suspend its obligations under the Contract until payment of the overdue amount is made.
9.4 The Supplier may charge the Customer interest (both before and after any judgement) on the amount unpaid, at the rate of 4 per cent per month (or part of a month) until payment in full is made.
9.5 The charges may be increased by the Supplier at any time to reflect any increase in the rate of inflation determined in accordance with the Retail Prices Index. Any increase will be notified to the Customer in advance in accordance with condition 15.8.
9.6 The Supplier reserves the right to make a charge in accordance with its current rates if it is erroneously notified of an Equipment fault on more than two occasions in any calendar month.

9.7 Additional fees will be quoted for by the Supplier if enhanced levels of cover are chosen by the Customer (such levels referred to at condition 7 above).
9.8 The provision of the Maintenance Services is subject to compliance by the Customer with the Fair Usage Policy. A failure on the part of the Customer to comply with the Fair Usage Policy may result in additional charges being levied by the Supplier as referred to in the Fair Usage Policy.

10. LIMITATION OF LIABILITY

10.1 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.
10.2 Neither party excludes or limits its liability to the other for:
10.2.1 death or personal injury resulting from the proven negligence of either party, its employees or agents;
10.2.2 fraud or fraudulent misrepresentation;
10.2.3 breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982.
10.3.1 indirect or consequential loss, loss of profits, business revenue, goodwill or any economic loss arising under or in connection with the Contract;
10.3.2 any claim made against the Customer by a third party that does not follow a breach of these Terms by the Supplier;
10.3.3 any loss or damage to the Customer caused by or arising from any act or omission of the customer, any PTO or Value Added Service supplier, or other customers or persons;
10.3.4 any claim in circumstances where any sum owing by the Customer to the Supplier has not been paid;
10.3.5 the imposition of legal or regulatory restrictions which prevent the Supplier from supplying the Service.
10.4 Subject to condition 10.2, 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, tort (including negligence), breach of statutory duty, or otherwise shall not exceed the lesser of:
10.4.1 the aggregate of all charges payable or paid by the Customer for the Service supplied in the 12-month period beginning on the Commencement Date or its anniversary in which the event giving rise to the claim occurs; or
10.4.2 £200,000.
10.5 The terms implied by sections 3 to 5 of the Supply of Goods and Services Act 1982, to the fullest extent permitted by law, excluded from the Contract.
10.6 This condition 10 shall survive termination of the Contract.
10.7 The Customer shall fully indemnify the Supplier in respect of loss or damage to the Supplier's property or death of any of the Supplier's employees caused by the negligence or willful misconduct of the Customer.

11. THE CUSTOMERS OBLIGATIONS

11.1 The Customer agrees that it will:
11.1.1 pay the Supplier all amounts due under the Contract at the due times;
11.1.2 ensure that the Equipment is not, without prior approval from the Supplier moved at any time from the address at which it was originally installed, or altered, adjusted or interfered with in any way except by the Supplier's servants or agents. Alterations include the reprogramming of the Equipment to change network providers for the purpose of least cost routing;
11.1.3 provide the Supplier with full access to the Equipment and Software during the hours of the agreed service level to enable Maintenance Services to be carried out;
11.1.4 pay the Supplier's charges for reprogramming the Equipment required as a result of an error by any person other than the Supplier's servants or agents;
11.1.5 not alter or extend the Equipment without prior consent of the Supplier (an additional charge may, at the Supplier's sole discretion be made for the repair/replacement of altered Equipment);
11.1.6 provide the Supplier with details of the installer of the Equipment, a copy of its Pre-Connection Inspection Certificate and access to all relevant site records.

12. ADDITIONAL EQUIPMENT

12.1 If at any time throughout the term of the Contract the Supplier agrees to provide the Customer with any additional equipment ("additional equipment") then:
12.1.1 such additional equipment and associated software will form part of the Equipment and Software for the purposes of this Contract; and
12.1.2 the service charge for the Maintenance Services shall be increased by an amount equal to the agreed service charge for the Maintenance Services as specified on the additional equipment purchase order in respect of the additional equipment such increase to be effective from the date on which the additional equipment is provided to the Customer.

13. TERMINATION AND TERMINATION FEES

13.1 This Contract may be terminated:
13.1.1 notwithstanding condition 2.3 and subject to condition 13.3, by either party giving at least 90 days' written notice to the other party expiring on an anniversary of the Commencement Date; or
13.1.2 (a) by the Supplier with immediate effect if:
the Customer is in breach of any provision of this Contract or any other contract that the Customer has in place with the Supplier or any third party funder of goods or services provided by the Supplier and does not rectify the breach within 14 days of the Supplier's notice of such breach;
(b) there is a change of control of the Customer (within the meaning of section 1124 of the Corporation Taxes Act 2010);
(c) the Customer makes any voluntary arrangement with its creditors or becomes subject to an administration order or (being an individual or firm) becomes bankrupt or (being a limited company) goes into liquidation; or an encumbrancer takes possession, or a receiver is appointed, of any of the property or assets of the Customer; or the Customer ceases, or threatens to cease, to carry on business; or the Supplier reasonably apprehends that any of these events is about to occur in relation to the Customer and notifies the Customer accordingly.
(d) if the Customer fails to enter into and/or maintain a valid contract with the Supplier for broadband services, network services and line rental.
13.2 On termination of the Contract for any reason:
(a) the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest and, in respect of Maintenance Services supplied but for which no invoice has been submitted, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;
(b) the acquired rights, remedies, obligations and liabilities of the parties as at expiry or 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
(c) clauses which expressly or by implication have effect after termination shall continue in full force and effect.
13.3 Notwithstanding condition 13.2 in the event of termination of the Contract:
(a) by the Customer pursuant to condition 13.1.1 the Customer shall immediately pay the charges in respect of the remainder of the Minimum Term or the Extended Term (as the case may be); or
(b) by the Supplier pursuant to condition 13.1.2 the Customer shall immediately pay such proportion of the charges in respect of the remainder of the Minimum Term or the Extended Term (as the case may be) after the date of termination as the Supplier calculates (acting reasonably) represents a genuine estimate of the loss suffered as a result of the breach. Such amount shall never exceed the amount equal to the charges for the remainder of the Minimum Term or the Extended Term (as the case may be).

14. FORCE MAJEURE

14.1 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 an event beyond the reasonable control of the Supplier including but not limited to failures or surges of electrical power, damage to property by third parties, 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 the Supplier or subcontractors (Force Majeure Event).
14.2 If the Force Majeure Event prevents the Supplier from providing any of the Service for more than 4 weeks, the Supplier shall, without limiting its other rights or remedies, have the right to terminate the 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 including the Software 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 the Supplier by the Customer under or in connection with the Contract shall be in writing, addressed to its registered office or such other address as the Supplier may have specified to the Customer in writing in accordance with condition 15.2.2, and shall be delivered by recorded delivery.
15.2.2 Any notice or other communication given to the Customer by the Supplier shall be given by any of the following methods (at the Supplier's discretion):
(a) in writing, addressed to the Customer's registered office (if it is a Company) or its principal place of business (in any other case) or such other address as the Customer may have specified to the Supplier in writing in accordance with clause 15.2.1;
(b) by facsimile to the relevant fax number as the Customer may have notified to the Supplier; or
(c) by email to the relevant email address as the Customer may have notified to the Supplier.
15.2.3 A notice or other communication shall be deemed to have been received if sent by pre-paid first class post or other next working day delivery service, at 9.00am on the second Business Day after posting if delivered by commercial courier or recorded delivery on the date and at the time that the courier's delivery receipt is signed, or, if sent by fax or email by the Supplier, one Business Day after transmission.
15.2.4 Where a notice is sent by post, the Supplier shall be deemed to have taken reasonable steps to ensure that it is adequately protected.
15.2.5 Subject to condition 15.2.1 and 15.2.2, both the Supplier and the Customer can sign notices or other communications via electronic signatures. The Customer shall comply with any direct debit or signature instructions provided to it by the Supplier from time to time.
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 in the case of the Supplier signed by an officer of the Supplier) 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 anyway.
15.6 Data Protection. The Customer and the Supplier will comply with their respective obligations under the Data Protection Act 1998 (DPA). Where one party transfers personal data (as defined in the DPA) to another for processing, the receiving party will process that data only for the period of and to the extent necessary for the performance of the Contract; will take measures to keep it secure; and, where it transfers personal data outside the European Economic Area or to any subcontractor, will ensure that it is adequately protected.
15.7 Third parties. The Supplier may exercise any of its rights or fulfil any of its obligations hereunder through any company in its Group. Other than a company in the Supplier's Group, a person who is not a party to the Contract shall not have any rights to enforce its terms.
15.8 Variation. Except as set out in these Terms, 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. Notwithstanding this the Supplier may change these Terms at any time. The Supplier will publish details of such changes on-line on the Supplier's Website at least two weeks before the change is to take effect.
15.9 Resolving Disputes. The Supplier will try to solve any disputes with the Customer. However, if the parties cannot agree, the Customer may refer the dispute to any recognised dispute resolution service. Details of these and how to refer a dispute are set out within the Supplier's Website.
15.10 Governing law. The Contract 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.
15.11 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 the Contract or its subject matter or formation (including non-contractual disputes or claims).
15.12 [Cleartech to insert direct debit guarantee to end of the terms where relevant]