

# CONDITIONS FOR PURCHASE OF GOODS AND SERVICES (VERSION 1 SEPTEMBER 2011)

Between BAYER (MALAWI) LIMITED, a limited liability company registered and organized under the laws of Malawi ("Buyer") and the person(s), firm or company fulfilling an Order ("Seller").

## 1. GENERAL

In these conditions ("Conditions") the following definitions apply:

Business Day: day (other than Saturday, Sunday or public holiday) when banks are open for business in the recipient's location;

Contract: consists of the Order, the Specification (if any) and any documents or information specified in the Order or on which Buyer based its decision to purchase Goods or Services. Should there be inconsistency between the documents comprising the Contract, the order of precedence is the order they are listed in this definition;

Goods: goods (or any part of them) agreed in the Contract to be supplied to Buyer by Seller;

IPRs: patents, rights to inventions, utility models, copyright and related rights, trademarks, trade, business and domain names, rights in goodwill or to sue for passing-off, rights in designs and software, database rights, know-how, trade secrets and any other intellectual property rights, whether registered or not, including applications, renewals and extensions thereof worldwide;

Order: Buyer's purchase order, Buyer's written acceptance of Seller's quote, or overall, as the case may be;

Results: documents, products, material and workmanship developed by Seller, its agents, subcontractors, consultants or employees relating to Services in any form;

Services: services (or any part of them) agreed in the Contract to be supplied to Buyer by Seller;

Site: location where the Services shall be performed; and

Specification: specification for Goods or Services agreed in writing by Buyer and Seller.

## 2. APPLICATION OF CONDITIONS

2.1 These Conditions apply to the Contract to the exclusion of all other terms that Seller seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.

2.2 These Conditions apply to all purchases by Buyer from Seller. Buyer may issue a new version of these Conditions which shall be immediately effective. Variations to the current version of these Conditions have no effect unless expressly agreed in writing and signed by an authorised person on behalf of Buyer. All Conditions apply to both Goods and Services unless stated otherwise.

2.3 Each Order is an offer by Buyer to purchase Goods or Services under these Conditions. Orders are accepted on the earlier of (a) Seller issuing written acceptance of an Order; or (b) Seller doing any act consistent with fulfilling an Order, at which point the Contract comes into existence.

2.4 The Contract constitutes the entire agreement between the parties.

2.5 Buyer reserves the right to change any Specification, delivery dates and other Order terms prior to, either delivery of Goods to the Delivery Point or Service performance, as the case may be.

## 3. WARRANTIES

3.1 Seller warrants (a) Goods and Services (i) comply with these Conditions, any Specification and other description provided or adopted; (ii) are of satisfactory quality and fit for any purpose held out by Seller or made known to Seller by Buyer expressly or impliedly, and in this respect Buyer relies on Seller's skill and judgment; and (iii) comply with all applicable legal and regulatory requirements; (b) at all times it has and maintains all licenses, permissions, authorizations, consents, permits and sufficient resources needed to conduct and fulfill its Contract obligations; and (c) where Contract performance requires Seller to visit a Site, including Buyer's premises, Seller shall meet in full all Site health, safety, environmental and security procedures.

3.2 In respect of Goods, Seller warrants (a) Goods shall be free from defects in design, material and workmanship and remain so for at least 36 months after delivery to the Delivery Point, or longer as required by the Specification; and (b) its Goods handling procedure, packages and delivery vehicle meet all applicable legal and regulatory requirements governing the handling, labeling and transport of Goods.

3.3 In respect of Services, Seller warrants (a) Service performance shall be to the highest standards of skill, care and diligence; (b) pay, working hours and working conditions of its staff accord with national agreements (if any) for the industry or trade applicable to the Services; and (c) it understands the nature and extent of the Services and has visited Site (if any) and makes no claim based on his failure to do so.

3.4 Buyer has the right to inspect and test Goods any time before delivery to the Delivery Point. If after such inspection or testing Buyer considers Goods do not conform or are unlikely to comply with the Specification or Seller's warranties in Conditions 3.1 and 3.2, Buyer shall inform Seller who shall immediately take necessary remedial action to ensure compliance. Notwithstanding any inspection or testing, Seller remains fully responsible for Goods and inspection or testing shall not reduce or otherwise affect Seller's obligations, and Buyer shall have the right to conduct further inspections and tests after Seller has carried out its remedial actions.

3.5 All warranties in these Conditions equally apply for the benefit of Buyer's successors, assigns, customers and users of its products.

## 4. DELIVERY OF GOODS AND PERFORMANCE OF SERVICES

4.1 Seller warrants: (a) Goods are properly packed and secured in such manner to enable them to reach their destination in good condition; (b) each Goods delivery is accompanied by a delivery note showing the Order date, Order number, type and quantity of Goods, storage instructions (if any) and, if Goods are delivered by instalments, the outstanding balance of Goods awaiting delivery; and (c) if Seller requires Buyer to return packaging material to Seller, this is clearly stated on the delivery note (such return being at Seller's cost).

4.2 Seller shall deliver Goods: (a) on the date specified in the Order, or, if no date is specified, within 14 days of the Order date for which time is of the essence; (b) to the location set out in the Order, or as instructed by Buyer before delivery (#Delivery Point); and (c) during Buyer's normal business hours.

4.3 Delivery of Goods shall be completed on the completion of unloading Goods at the Delivery Point. If Seller delivers more or less than the quantity of Goods ordered, Buyer may reject Goods, which shall be returnable at Seller's risk and expense. If Seller delivers more or less than the quantity of Goods ordered, and Buyer accepts the delivery, a pro rata adjustment shall be made to the Goods invoice.

4.4 Seller shall not deliver Goods in instalments without Buyer's prior written consent. On receipt of such consent, they may be invoiced and paid for separately. However, failure by Seller to deliver any instalment on time or at all or any defect in an instalment shall entitle Buyer to the remedies in Condition 5.

4.5 Seller shall meet, and time is of the essence as to, Service performance and completion dates.

## 5. REMEDIES

5.1 If Goods are not delivered on the due date (as referred to in Condition 4.2) or Service performance or completion dates are not met, or if Goods or Services do not comply with their respective provisions of Condition 3, then Buyer has the right to any one or more of the following remedies, whether or not it has accepted Goods or Services, to: (a) terminate the Contract in whole or in part without liability to Seller; (b) refuse to accept subsequent delivery of Goods or Service performance; (c) recover from Seller costs incurred by Buyer to obtain substitute goods or services elsewhere; (d) require Seller, without charge to Buyer, to carry out additional work in order to correct Seller's failure; (e) claim damages for costs, losses and expenses incurred by Buyer and attributable to Seller's failure to meet its Contract obligations; (f) in respect of Goods, (i) reject Goods in whole or in part and return them to Seller at Seller's own risk and expense; or (ii) require Seller to repair or replace rejected Goods, or provide a full refund of the price of rejected Goods; and (g) in respect of Services, have Seller refund all sums previously paid by Buyer to Seller under Contract.

5.2 If Goods are not delivered on the due date, or Service performance or completion dates are not met, Buyer may at its option claim or deduct 10% of the price of the Goods or Services for each 7 days delay in delivery or performance as liquidated damages, to a maximum of 30% of the total price of the Goods or Services. The parties agree such liquidated damages represent a genuine pre-estimate of the loss.

5.3 These Conditions apply to repaired or replacement Goods and substituted or remedial Services supplied by Seller.

5.4 Seller shall take every practicable precaution not to damage or injure property or persons. Seller shall keep Buyer indemnified in full against, and hold Buyer harmless from, all costs, expenses, damages and losses whether direct, indirect or consequential (including loss of profit, loss of business, depletion of goodwill and/or connected), including interest, penalties, and legal and other professional fees and expenses awarded against, incurred or paid by Buyer as a result of or in connection with claims made against Buyer: (a) for actual or alleged infringement of third party IPRs arising out of, or connected to, the supply of use of Goods or Services (including Results); (b) by a third party arising out of, or connected to, the supply of Goods, Services or Results, to the extent such claim arises out of the breach, negligent performance or failure or delay in performance of the Contract by Seller, its employees, agents or subcontractors; and (c) by a third party for death, personal injury or damage to property arising out of, or connected to, defects in Goods or performance or non-performance of Services.

5.5 Buyer rights and remedies under these Conditions are in addition to those implied by law.

## 6. TITLE AND RISK IN GOODS

Title and risk in Goods passes to Buyer on completion of delivery to Delivery Point.

## 7. PRICE, PAYMENT AND TAX

7.1 The price of Goods or Services shall be the price in the Order, or, if no price is quoted, the price in Seller's published price list on the date the Order was sent to Seller. The price of Goods and Services is the total consideration for Goods or Services ordered and excludes value added, or equivalent, taxes (#VAT#), but includes other taxes, charges, duties, fees or any similar charges, appropriate insurance, and in respect of Services all benefits, compensation and similar items in respect of Seller staff providing Services and, in respect of Goods, packaging and carriage. No extra charges shall be effective unless agreed in writing and signed by Buyer. Buyer shall, on receipt of a valid VAT invoice from Seller, pay to Seller such additional amounts in respect of VAT as are chargeable on the supply of Goods or Services.

7.2 Seller warrants that the Goods or Services and price thereof shall not violate any law, governmental decree, order, sanction, rule or regulation.

7.3 Seller may invoice Buyer for Goods or Services for each Order any time after the completion of delivery of Goods or performance of Services, showing Order number, amount payable and VAT, Seller bank details, applicable discounts, rebates and similar terms, transport charges and point of shipment and, in respect of Services, hours spent, overtime (if agreed beforehand) and performance dates. Buyer shall pay correctly rendered invoices within 45 days after the invoice is received and accepted by Buyer. Payment shall be made to the bank account nominated in writing by Seller. Buyer may, without limiting any other rights or remedies it may have, set off any amount owed to it by Seller against any amounts payable by it to Seller under the Contract. Early payment discounts or other discounts shall be calculated from the date the invoice is received by Buyer.

7.4 If a party fails to make a payment due to the other under the Contract by the due date for payment (#Due Date#), the defaulting party shall pay interest on the overdue amount at the rate of 7% per annum. Such interest shall accrue on a daily basis from the Due Date until the date of actual payment of the overdue amount, whether before or after judgment. The defaulting party shall pay the interest together with the overdue amount. This Condition shall not apply to payments the defaulting party disputes in good faith.

7.5 In the event of the imposition of any tax or duty on Goods or Services being borne by Buyer. Seller shall remit to Buyer any refund which Seller is entitled to or can recover.

## 8. BUYER PROPERTY, SELLER EQUIPMENT AND SITE

8.1 Seller acknowledges that materials, equipment, computer programs, systems, cabling or facilities, tools, drawings, specifications, and data, including, without limitation, any IPRs made available by Buyer to Seller or to which Seller has access (#Buyer Property#) and all rights in Buyer Property, are and shall remain the exclusive property of Buyer. Seller shall satisfy itself that Buyer Property is suitable for the intended purpose, keep Buyer Property safe at its own risk, maintain it in good condition until returned to Buyer, and not dispose or use the same other than in accordance with Buyer's written instructions.

8.2 Seller shall not commence Services without obtaining Buyer's written consent. Site access is not exclusive to Seller and is only to the extent needed to conduct Services concurrently with the execution of work by others. Buyer may, at any time during Service performance, order in writing the immediate (a) removal of any materials or personnel from Site; (b) substitution of proper and suitable materials; or (c) halt Services where Buyer believes Seller has acted negligently or his acts or omissions may infringe Site rules.

8.3 Seller is responsible for the suitability and safety of his equipment. No equipment shall be used which may be unsuitable, unsafe or able to cause damage. Without reducing Seller's responsibility, Buyer may inspect such equipment and prevent its use if Buyer considers it may infringe this Condition. On Service completion, Seller shall remove his plant, equipment and unused materials and shall clear from Site all rubbish from the Services.

## 9. INTELLECTUAL PROPERTY AND RESULTS

9.1 Seller warrants that Buyer's (i) purchase, use or sale (in whole or in part) of Goods, or (ii) purchase of Services and use or sale (in whole or in part) of Results, will not infringe third party IPRs.

9.2 Results shall be provided to, and be the exclusive property of, Buyer. Seller assigns with full title guarantee and free from all third party rights, all IPRs and other rights in Results to Buyer. Seller shall do, or procure to be done, all acts Buyer requires to secure the full Contract benefit, including all rights, title and interest in such IPRs and any other rights. Seller shall not transfer or make available Results to any person except Buyer. Buyer may use and transfer Results for any purpose and may create derivative works therefrom.

## 10. INSURANCE

10.1 During the Contract term and for 5 years thereafter, Seller shall maintain in force, with a reputable insurance company, professional indemnity insurance, product liability insurance and public liability insurance to cover such liability as may arise under or in connection with the Contract, and shall, on Buyer's request, produce the insurance certificate giving details of cover and the receipt for the current year's premium for each insurance.

10.2 Seller shall immediately notify Buyer of all accident or damage likely to form a claim under Buyer's insurance and shall provide all information and assistance as required and shall not negotiate, pay, settle, admit or repudiate any claim unless otherwise agreed in writing.

## 11. CONFIDENTIALITY AND PUBLICITY

11.1 Seller shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives disclosed to Seller by Buyer, its employees, agents or subcontractors, and any other confidential information concerning Buyer's business, its products or services which Seller may obtain. Seller shall only disclose such confidential information to those of its employees, agents or subcontractors who need to know the same to discharge Seller's Contract obligations, and shall ensure that such employees, agents or subcontractors keep such information confidential. No photographs or suchlike shall be taken on any Site.

11.2 Seller shall make no publication, oral, written or otherwise, concerning the Contract, its subject matter or any Results.

## 12. TERMINATION AND SURVIVAL

12.1 Buyer may terminate the Contract in whole or in part for convenience, or for any event in Condition 12.2, with immediate effect by giving written notice to Seller whereupon Seller shall stop all work on Services or deliveries of Goods. Buyer shall pay Seller reasonable compensation for work-in-progress regarding Services, or Goods delivered by Buyer, at the termination date, but this shall not include loss of anticipated profits or any indirect or consequential loss.

12.2 For the purpose of Condition 12.1, the events are: if Seller becomes subject to any of the following or Buyer believes Seller is about to become subject to any of them: a bankruptcy order made against Seller or Seller makes an arrangement or composition with its creditors, or otherwise takes the benefit of any statute for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part thereof, or a resolution is passed or a petition presented to any court for the winding up of Seller or for the granting of an administration order in respect of Seller, or any proceedings are commenced relating to the insolvency or possible insolvency of Seller.

12.3 At any stage during the Contract term or thereafter, within 14 days of a request, (a) Receiving Party shall return, and certify the return of, all confidential information (and copies thereof) in his possession or under his control to Disclosing Party; and (b) Seller shall return to Buyer all Buyer Property and provide to Buyer any final or interim reports due in respect of Services or Results.

12.4 Contract termination, however arising, shall not affect a party's rights or remedies accrued at termination. Conditions expressly or impliedly surviving Contract termination shall continue in full force and effect, including Conditions 3, 5, 9, 10, 11, 12.3 and 12.4.

## 13. FORCE MAJEURE

Buyer may immediately terminate the Contract, defer payment dates or, in respect of Goods, reduce volumes ordered or defer delivery dates, or, in respect of Services, defer performance dates, without liability to Buyer, if it is prevented from or delayed in carrying on its business due to circumstances beyond the reasonable control of Buyer including, without limitation, acts of God, governmental actions, war or national emergency or defence requirements, riot, civil commotion, fire, explosion, flood, extreme climatic conditions, pests and diseases, epidemic, lock-outs, injunction, embargoes, import or export regulations, labour, containers, transportation facilities, accident, malfunction of machinery or apparatus, strikes or other labour disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable raw materials including fuel and power.

## 14. APPLICABLE LAW AND JURISDICTION

These Conditions and disputes or claims arising out of or connected to the Contract, including disputes regarding the existence, validity, enforceability, breach or termination thereof, are to be construed according to the laws of Kenya and shall be finally settled by the courts of the country in which Buyer is domiciled, or of the Delivery Point in the case of Goods, or location where the Services were performed, at Buyer's exclusive option.

## 15. MISCELLANEOUS

15.1 If a provision of these Conditions and/or the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions and sub-provision shall continue in full force and effect.

15.2 Failure or delay by Buyer to enforce or partially enforce a provision of these Conditions and/or the Contract will not be construed as a waiver of its rights. Waivers by Buyer of a breach or default by Seller will not be deemed a waiver of a subsequent breach or default and will not affect the other terms of these Conditions and/or the Contract.

15.3 (a) Notices given to a party under or connected to the Contract shall be in writing, addressed to that party at its registered office (if a company) or principal place of business (in other cases) or such other address as that party specifies in writing under this Condition, and shall be sent by recorded delivery, or confirmed fax, or electronic or other communications are deemed to have arrived: if delivered personally, when left at the address referred to in Condition 15.3(a); 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, one Business Day after transmission.

15.4 Buyer may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract. Seller may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract without Buyer's prior written consent.

15.5 A person who is not a party to the Contract shall have no rights under or in connection with it, except as set out in Condition 15.4.

15.6 Seller's relationship to Buyer is as independent contractor. Seller has no authority to bind, commit or incur expense in the name of Buyer towards third parties. Nothing herein shall be deemed or construed to create a joint venture, partnership, employment or principal/agent relationship between Buyer and Seller for any purpose and nothing herein shall, or shall be deemed, to create any employer-employee or other relationship of any kind between Buyer and any employees or other agents of Seller performing any Services.

15.7 Parties agree that no payment or transfer of anything of value, or promise to do so, shall be made directly or indirectly to any (a) governmental official or employee (including employees of government owned and controlled corporations, agencies or bodies); (b) political party, official or candidate thereof or family member of such person; (c) intermediary for payment to any of the foregoing; or (d) other person or entity, if such payment, transfer or promise to do so would violate the country laws in which it is made or the United States Foreign Corrupt Practices Act. Seller shall retain no subcontractor, representative or agent connected to this Contract without Buyer's written consent. Seller shall receive Buyer's written consent before interacting with governmental officials or employees on Buyer's behalf. Breach of Condition 15.7 shall allow Buyer to immediately terminate the Contract.