

## GENERAL TERMS AND CONDITIONS OF POLYMORPH

1.1 In these Terms and Conditions, unless the context otherwise requires, the following words have the following meanings:

**“Agreement”** means the agreement between the Client and Polymorph for supply of the Services formed by these Conditions including but not limited to any consultancy, software licence, source code licence, maintenance agreement, service agreement, development agreement or other; **“Client”** means the party contracting for the Services as set out in any Agreement; **“Conditions”** means these terms and conditions; **“Content”** means any information required for the Services; **“Delivery Date”** shall mean the Milestone set out in the Agreement for delivery of the specified Services; **“Fee(s)”** the fee(s) payable to Polymorph for the Services as set out in any Agreement or supporting document; **“Intellectual Property Rights”** means all vested, contingent and future intellectual property rights including but not limited to patents, copyrights, registered and unregistered trademarks, service marks, domain names, database rights, registered designs, design rights, know-how, inventions, get-up, confidential information, trade and business names and any other similar protected rights in any country subsisting now or in the future together with, in relation to any of the foregoing rights: (i) the right to sue for past infringements; (ii) any applications for registration (iii) any licenses; **“Milestones”** means dates that may be identified in any Agreement by when events shall occur; **“Polymorph”** means Polymorph Ltd of The Heath Business and Technical Park, Runcorn, Cheshire, WA7 4QX; **“Polymorph Content”** means all computer software including standard or customised scripts and programs, all text, graphics, video, audio or other material or creative content (or any media) provided by Polymorph and created for or used in the course of the providing of the Services; **“Payment Schedule”** means the schedule detailing the dates, amount and manner of payment to Polymorph for the provision of the Services as set out in any Agreement; **“Services”** means the services including consultancy and/or the provision of software and code licences, maintenance, training, hosting, service provision or support that Polymorph agrees to provide to the Client in accordance with clause 3 of these Conditions; **“Services Schedule”** means any schedule detailing the Works and Services and their associated costs; **“Specification”** the specification for the Works and Services as set out in the Agreements; **“Works”** means any and all works and materials provided or developed by Polymorph in the provision of the Services including, without limitation, any software, any ancillary materials and any Polymorph Content.

1.2 In these Conditions, unless the context otherwise requires: (a) words in the singular include the plural and vice versa and words in one gender include any other gender; and (b) a reference to: (i) “Polymorph” includes any sub-contractor or agent of Polymorph for the purposes of carrying out its obligations under the Agreement (ii) any party includes its successors in title and permitted assigns;

1.3 In the event of any conflict or inconsistency between these Conditions and (a) any Project Plan; (b) the Payment Schedule; or (c) any Specification; or (d) Services Schedule, or (e) any Schedule; (f) or any Agreement between the Client and Polymorph then these Conditions shall prevail.

1.4 In these Conditions or any Agreement unless the context otherwise requires:

1.4.1 Words importing persons include firms, companies and corporations and vice versa;

1.4.2 References to numbered clauses and schedules are references to the relevant clause in or schedule to this Agreement;

1.4.3 Reference in any schedule to this Agreement to numbered paragraphs relate to the numbered paragraphs of that schedule;

1.4.4 The headings to the clauses, schedules and paragraphs of this Agreement will not affect the interpretation;

1.4.5 Any obligation on any party not to do or omit to do anything is to include an obligation not to allow that thing to be done or omitted to be done;

1.5 Any party who agrees to do something will be deemed to fulfil that obligation if that party procures that it is done.

1.6 In the case of conflict or ambiguity between any provision contained in the body of these Conditions and any provision contained in any Agreement, the provisions in these Conditions shall take precedence.

## 2. Agreements

2.1 These Conditions apply to all Agreements between Polymorph and the Client.

2.2 Any Agreement will be on these Conditions to the exclusion of all other representations, warranties, terms and conditions whether rendered prior to or subsequent to these Conditions (including without limitation any terms or conditions which the Client purports to apply).

2.3 No variation of Agreement shall be binding unless agreed in writing between the authorised representative of Polymorph and the Client.

2.4 No action by Polymorph shall purport to its acceptance of any terms or conditions of any Client or third party and Polymorph's Conditions shall always be deemed subsequent to any other party's terms and conditions unless otherwise stated in writing by an authorised officer of Polymorph.

2.5 Any order placed by the Client shall be deemed an offer that shall be capable of acceptance by Polymorph and shall be deemed accepted at the initial point of delivery of the services by Polymorph.

### **3. The Services of Polymorph**

- 3.1 Polymorph shall supply the Client with the Services exercising all reasonable care and skill.
- 3.2 The parties shall meet from time to time or discuss by telephone or by other communications in order to review progress on the provision of the Services and to agree any minor variations to any Specification and Services Schedule. No such variations shall be valid unless signed by both parties.
- 3.3 The parties may enter into a new Agreement in respect of any requirement by the Client for variations that are substantial.
- 3.4 Subject to the Client's compliance with clause 4, Polymorph shall provide the Services in accordance with the applicable Agreement, Specification and Services Schedule.
- 3.5 Polymorph is under no obligation to handle technical enquiries from third parties following completion of the Services. In the event of the Client requiring maintenance or support services, these services will be for the avoidance of doubt covered by these Conditions.

### **4. Assistance from the Client**

- 4.1 The Client shall at all times provide Polymorph with such assistance, co-operation, information, entrance onto premises permission, licences and source materials as may reasonably be necessary to enable Polymorph to fulfil its obligations under the Agreement.

### **5. Delivery**

- 5.1 Polymorph shall deliver the Services in accordance with the Milestones.
- 5.2 If Polymorph fails to deliver any of the Services in accordance with the Milestones then (in the absence of any default on the part of the Client or in the absence of force majeure as described in clause 14 below) the Client shall notify Polymorph of its failure to deliver and request that Polymorph cure such failure.

### **6. Change Control**

- 6.1 At any time prior to the Delivery Date the Client in consideration of a further payment may in writing request from time to time changes to any part of the Specification. Notwithstanding anything to the contrary in these Conditions Polymorph shall not be under any obligation to agree to any request or recommendation for a change.
- 6.2 Any investigation into the proposed change shall be carried out only on the Client's prior written instruction and following investigation (if any) Polymorph will give a written estimate showing the increase or decrease in the Fees and any related effect on other contractual matters including without limitation Delivery Date should the proposed change be implemented.
- 6.3 Should the Client wish to proceed with the proposed change it will instruct Polymorph in writing of its wish within 5 working days of the receipt of the written estimate (or such longer period as may be agreed). Those parts of these Conditions affected by the change will then be deemed to be modified accordingly.
- 6.4 Until any change is formally agreed between Polymorph and the Client, Polymorph will continue to perform and be paid for the Services as if the change had not been proposed. If the proposed change represents a significant alteration from the Specifications set out in any Services Schedule then Polymorph may make a reasonable charge for implementing the proposed change.

### **7. Payment**

- 7.1 In consideration for performance of the Services, the Client shall pay the Fees in accordance with the Payment Schedule or Agreement, at the time set out therein.
- 7.2 All sums payable under any Agreement are exclusive of VAT, which shall be charged in addition at the prevailing rate and shall be paid by the Client on submission of a valid tax invoice.
- 7.3 Title to any product, software or any Services where applicable shall not pass to the Client until Polymorph has received full payment of the Fees.
- 7.4 Furthermore, the Client shall pay such reasonable out-of-pocket expenses incurred by Polymorph together with such sums as may become due under these Conditions.
- 7.5 Payment of the Fees and other charges are due within 28 working days of the date of an invoice from Polymorph. Polymorph shall be entitled to charge interest on late payments at the rate of 4% above the base rate of Lloyds TSB current during that time on any amount outstanding, which is not paid in accordance with this clause. Polymorph is aware of its rights under the Late Payment of Commercial Debts (Interest) Act 1998.
- 7.6 If the Client fails to pay any of the Fees in accordance with this clause, the directors of the Client shall be personally liable for payment of all unpaid Fees.
- 7.7 The parties agree that Polymorph may review and increase its charges, provided that such charges cannot be increased more than once in any 3 month period. Polymorph shall give the Client written notice of any such increase 30 days before the proposed date of that increase. If such increase is not acceptable to the Client, it may, within 7 days of such notice being received or deemed to have been received in accordance with clause 23, terminate the agreement 14 days written notice to Polymorph.

## **8. Intellectual Property Rights**

8.1 Intellectual Property Rights in the Works and Services or which arise out of or are acquired in the performance of this Agreement are and shall remain vested in Polymorph.

8.2 The Client undertakes not to reverse engineer, decompile or disassemble the Works except to the extent permitted under Section 50 of the Copyright Designs and Patents Act 1988 or otherwise under law.

8.3 Polymorph shall be entitled to include a footer credit or similar in an appropriately unobtrusive manner containing an appropriate acknowledgement of the Intellectual Property Rights of Polymorph and of the work carried out by Polymorph including a link to their own web site at [www.polymorph.co.uk](http://www.polymorph.co.uk)

8.4 Polymorph shall be entitled to use the trading names and trademarks and service marks of the Client (in a reasonable manner) in the production of corporate brochures, press releases and similar printed or online materials solely for the purposes of promoting Polymorph and its Services to third parties. Polymorph shall supply the Client with copies of such use on request.

8.5 The Client shall at the earliest opportunity: (a) notify Polymorph of any infringement or suspected infringement by a third party of Polymorph's Intellectual Property Rights or misuse of their confidential information, to the extent that they become aware of such infringement or misuse; (b) notify Polymorph of any threat or notice of proceedings claiming intellectual property infringement or breach of confidence which is received and which relates to the Services; and (c) provide Polymorph (at the other's reasonable expense) with all reasonable assistance that may be required in order to deal with such infringement or claim.

8.6 Should Polymorph agree to a written request of the Client for the assignment of the Intellectual Property Rights in the software that is bespoke to the Client, then Polymorph shall so assign and the Client shall automatically whether in writing or otherwise and in consideration of the assignment, grant a perpetual royalty free licence to Polymorph in the Intellectual Property Rights assigned for the full duration of those rights.

8.7 The Intellectual Property Rights in and to the Client Content shall remain with the Client but shall be licensed to Polymorph for the purposes of carrying out the Services.

8.8 The Client shall reproduce on any copies of any Works the following: "© Copyright Polymorph Ltd. All rights reserved."

## **9. Confidentiality**

9.1 For the purposes of this clause 9, Polymorph's "Information" as defined below includes all creative ideas originating with Polymorph which are sufficiently original, particularised, well developed and commercially valuable to constitute confidential information at law which are notified to the Client, and the Client acknowledges that such ideas shall always be communicated by Polymorph in circumstances of confidentiality, expressed or otherwise.

9.2 Each party ("the Recipient") shall ensure that any confidential information ("Information") disclosed to it by the other shall not be used or disclosed save as is strictly necessary for the purposes of any Agreement and shall return to the other promptly on request any such Information provided by the other on any media.

9.3 The restriction contained in this clause 9 shall not apply to the extent that (a) disclosure or use of the Information is required by law; (b) evidence is available that the Information was already in the unrestricted possession of the Recipient before disclosure to it by the other party; or (c) the information falls within the public domain other than through the default of the Recipient.

9.4 The obligation of confidentiality in this clause shall continue in force for 5 years following termination of the Agreement, or in the case of licences 10 years following the Client ceasing to operate the said licenses in accordance with these Conditions.

## **10. Security and control**

The Client shall during the continuance of any Agreement:

10.1 effect and maintain adequate security measures to safeguard the Services or the Works from access or use by any unauthorised person;

10.2 retain the Works and all copies thereof under the Client's effective control;

10.3 maintain a full and accurate record of the Client's copying and disclosure of the Works and shall produce such record to the Client on request from time to time.

## **11. Liability**

11.1 Nothing in these Conditions shall exclude or restrict either party's liability for: (a) death or personal injury resulting from its negligence or that of its employees while acting in the course of their employment; (b) fraud or fraudulent misrepresentation; or (c) breach of the relevant warranty contained in clause 11.4

11.2 Subject to clause 11.1 above: (a) Polymorph's liability in contract, tort or otherwise howsoever arising out of or in connection with the Agreement shall in aggregate not exceed the Fees paid by the Client up to the date of the event giving rise to such liability relating to the project in which the event occurred only and (b) Polymorph shall not be liable to the Client in contract, tort or otherwise howsoever arising out of or in connection with the Agreement for any indirect loss, consequential loss, loss of profits, business opportunity, goodwill or reputation, general, special, incidental, exemplary or other damages arising from a breach by Polymorph of its warranty.

11.3 Polymorph undertakes to fix any errors or defects in the Works (meaning a non-compliance with the Specification) occurring within a period of ninety (90) days following delivery of the final version of the Works.

Polymorph shall attempt using reasonable endeavours, to correct defects reported to it within such a period. Polymorph's sole liability for failure to correct defects shall be to provide the Client with a copy of the corrected Works. If after sixty (60) business days Polymorph has not provided a corrected copy of the Works the Client shall be entitled to a refund of the fees paid by the Client for the non-corrected Works only less a reasonable allowance calculated by Polymorph for the period of successful use by the Client. Polymorph does not represent or warrant that the Works shall be error or defect free, nor that the Services shall guarantee that Polymorph shall be able to rectify any errors in the Works or Services.

11.4 The Client warrants that it has the right to supply all Client Content and shall indemnify Polymorph for any losses, costs, damages, claims, expenses or demands which Polymorph may incur to the extent that: (a) any claim that the Client Content infringes the Intellectual Property Rights of any third party (including without limitation that any hypertext links required to be included in the Content by the Client infringe the copyright of any third party web site); (b) any claim that the Client Content is defamatory, obscene, blasphemous or otherwise actionable under the laws and regulations of any jurisdiction; (c) any claim that the use of the Client Content in accordance with the Specifications is in breach of any Agreement between the Client and any third party or is subject to their prior approval; (d) any claim that the Client Content is in breach of any local or national laws, regulations or codes of conduct relating (by way of example only) to standards of advertising or age rating; and (e) the client breaches and terms of these Conditions or any Agreement.

11.5 Polymorph shall be liable only for the warranties it provides in these Conditions and Polymorph disclaims all other warranties whether express or implied.

11.6 Any Polymorph warranty shall be contingent upon the proper use of the Services by the Client.

11.7 No claim for any breach by Polymorph of its warranty or otherwise may be made more than twelve months following Delivery of the Services the subject of the breach.

11.8 Polymorph shall not be liable to the Client where the Client has misused the Services or has failed to use the Services in accordance with any guidelines provided from time to time by Polymorph where applicable and whether in writing or otherwise.

11.9 No terms set out in these Conditions or in any Agreement shall affect the statutory rights of the Client.

#### 11.10 Hosting Contracts

Polymorph will use all reasonable endeavours to ensure that any hosting services are provided to the Client on a constant, uninterrupted basis throughout the Term of this Agreement. Polymorph shall not be liable for downtime or interruptions to the provision of the Service. Where the Service is available for less than 98% of the time for three consecutive months, the Client shall be entitled to terminate the Agreement.

#### 11.11 Domain Name Registration

With regard to domain name registrations, Polymorph acts as an agent on behalf of the Client. The registration is between the Client and the appropriate Naming Authority. The Client is bound by the terms and conditions of the Naming Authority (available upon request). Polymorph cannot guarantee that it will be able to register any requested Domain Name and that until Polymorph has given specific confirmation of registration, the Client cannot assume that registration has been effected. Polymorph give no warranty that the Domain Name requested will not infringe the rights of any third party, and the Client indemnifies Polymorph in respect of any such infringements. Domain Name renewals are the responsibility of the Client.

## 12. Termination and Suspension

12.1 Either party may terminate any Agreement with immediate effect by written notice to the Client on or at any time after the occurrence of: (a) an irremediable material breach by the Client of the Agreement; (b) a remediable breach by the Client of a material obligation under the Conditions or Agreement where the Client fails to remedy the breach within thirty (30) days starting on the day after receipt of written notice from the Initiating Party giving full details of the breach and requiring the Client to remedy the breach and stating that a failure to remedy the breach may give rise to termination under this clause 12.1; or (c) more than one breach of the Conditions or Agreement by the Client, the cumulative effect of such breaches being: (i) sufficient to justify the inference that the Client would continue to deliver a substandard performance in relation to a substantial portion of the Agreement over the entire remaining period of the Agreement (and, in the case of the Client, in relation to its obligations under clause 4; or (ii) serious in the widest sense of having a serious effect on the benefit which the Polymorph would have otherwise derived in relation to a substantial portion of the Conditions or Agreement.

12.2 Either party may terminate this agreement upon thirty (30) day's written notice if the other is unable to pay its debts or enters into compulsory or voluntary liquidation (other than for the purpose of effecting a reconstruction or amalgamation) or compounds with or convenes a meeting of its creditors or has a receiver, administrative receiver or administrator appointed or if any circumstances arise which would entitle the Court or a creditor to appoint a receiver, administrative receiver or administrator or to present a winding-up petition or make a winding-up order.

12.3 Polymorph shall have the right at any time upon notice to the Client to suspend the provision of the Services in the event that the Client is in breach of its obligations under clause 4 of these Conditions. If the Services are not completed due to delays incurred as a result of the Client or the Client's agents or subcontractors and/or associated companies' acts or omissions then the dates and times set forth in any Agreement and the Delivery dates shall be extended accordingly.

12.4 All reasonable costs and expenses incurred by Polymorph by reason of any delay variation interruption or suspension of work arising from any act or omission of the Client its employee's agents or its subcontractors will be reimbursed to Polymorph by the Client, subject to Polymorph providing written particulars of such costs and expenses.

#### **12.5 Cancellation Fees**

The Client agrees to pay Polymorph a sum equal to the following percentages of the sums due in respect of scheduled Polymorph resource or training course dates agreed by both parties, which will be levied by a Cancellation Fee Invoice or appropriate reimbursement of funds held on account, by way of agreed damages if the Client fails to attend where attendance has been agreed, cancels Polymorph resource or withdraws from a course less than the following number of working days before the start of the agreed scheduled dates.

16 or more days at 0%, 11 – 15 days at 50%, 10 – 6 days at 75%, 5 – 0 days at 100%

Where re-scheduling planned Polymorph resource, the following will apply:

16 or more days at 0%, 11 – 15 days at 30%, 10 – 6 days at 60%, 5 – 0 days at 100%.

#### **13. Consequences of Termination**

13.1 Upon termination of the Agreement all rights granted in the Conditions and Agreement shall cease and the Client shall at the Client's expense immediately or as soon as possible deliver up to Polymorph or, at the request of Polymorph, destroy any copies which are not readily deliverable and provide Polymorph with a Certification of Destruction or similar document (such as copies held on the hard disk of any computer).

13.2 The termination of the Agreement for whatever cause shall not affect any provision of the Conditions or Agreement which is expressed to survive or operate in the event of the termination of the Agreement and shall not prejudice or affect the rights of any party against the other in respect of any breach of the Conditions or Agreement or in respect of any monies payable by either party to the other in respect of the period prior to termination.

13.3 The payment by the Client of any damages to Polymorph shall not affect any other remedies available to Polymorph, including but not limited to injunctive or other equitable relief.

#### **14. Force Majeure**

14.1 Neither party shall be liable in damages or have the right to terminate any Agreement for any delay or default in performing hereunder (unless such delay or default has continued for a period of more than thirty days) if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

#### **15. Data Protection**

15.1 The parties undertake to comply with the provisions of the Data Protection Act 1998 and any related legislation in so far as the same relates to the provisions and obligations of the Conditions or Agreement.

#### **16. Exclusivity, Assignment and Sub-Contracting**

16.1 Unless otherwise agreed: (a) the Services shall not be exclusive to the Client (meaning that Polymorph may provide equivalent services to any third party); (b) Polymorph shall be entitled to sub-contract any of the Services to a suitable third party; (c) the Client shall not assign its rights or obligations under any Agreement without Polymorph's prior written consent.

#### **17. Waiver**

17.1 Failure by Polymorph to exercise or enforce any right under any Agreement or these Conditions (including in the case of suspension under clause 11) shall not be deemed to be a waiver of any such right nor operate so as to prevent the exercise or enforcement of such right on any other occasion.

#### **18. Validity**

If any part, term or provision of any Agreement or these Conditions be held illegal or unenforceable, the validity or enforceability of the remainder of that Agreement or these Conditions shall not be affected.

#### **19. Third Party Rights**

The Contracts (rights of Third Parties) Act 1999 shall not apply to any Agreement or these Conditions and no person other than the parties to the Agreement or these terms shall have any rights under them, nor shall they be enforceable under that Act by any person other than the parties to them.

#### **20. Agency, partnership**

20.1 The Conditions or any Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the parties other than the contractual relationship expressly provided for in the Agreement.

## **21. Amendments**

21.1 The Conditions or any Agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the parties.

## **22. Announcements**

22.1 The Client shall not issue or make any public announcement or disclose any information regarding the Agreement unless prior written consent has been obtained from Polymorph.

## **23. Notice**

23.1 All notices under any Agreement or Conditions shall be in writing which shall mean by email, fax or registered post only.

23.2 Notices shall be deemed to have been duly given:

23.2.1 when delivered, if delivered by courier or other messenger (including registered mail) during normal business hours of the recipient; or

23.2.2 when sent, if transmitted by fax or e-mail and a successful transmission report or return receipt is generated; or

23.2.3 on the fifth business day following mailing, if mailed by national ordinary mail, postage prepaid; or

23.2.4 on the tenth business day following mailing, if mailed by airmail, postage prepaid,

in each case addressed to the most recent address, e-mail address, or facsimile number notified to the other party.

## **24. Entire Understanding**

24.1 These Conditions and any Agreement under them set out the entire agreement and understanding between the parties in respect of its subject matter and the Client acknowledges that it has entered into such Agreement in reliance only upon the representations, warranties and promises expressly contained or incorporated in these Conditions and/or Agreement and save as expressly set out therein, Polymorph shall have no liability in respect of any other representation, warranties or promise made or given prior to the date of the Agreements, howsoever made or given, unless it was made or given fraudulently.

## **25. Successors and assignees**

25.1 The Conditions and any Agreement shall be binding upon, and inure to the benefit of the parties and their respective successors and permitted assignees, and references to a party in any Agreement shall include its successors and permitted assignees.

25.2 In any Agreement references to a party include references to a person:

25.2.1 who for the time being is entitled (by assignment, novation or otherwise) to that party's rights under that Agreement (or any interest in those rights); or

25.2.2 who, as administrator, liquidator or otherwise, is entitled to exercise those rights,

and in particular those references include a person to whom those rights (or any interest in those rights) are transferred or pass as a result of a merger, division, reconstruction or other reorganisation involving that party. For this purpose, references to a party's rights under any Agreement include any similar rights to which another person becomes entitled as a result of a novation of the Agreement

## **26. Non-solicitation**

Both the Client and Polymorph agree that while this Agreement is in force and for a period of twelve (12) months thereafter, they shall not directly solicit or offer employment with the Client or Polymorph (or in the case of the Client, encourage or entice any client of the Client to solicit or offer employment) as the case may be to any of the other's officers, employees, contractors and associates who have been involved in or associated with any Agreement without the other's prior written consent

## **27. Law and Jurisdiction**

27.1 These Conditions shall be governed by and construed in accordance with the laws of England and the parties hereby submit to the exclusive jurisdiction of its Courts.