

# Terms & Conditions

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## **1.0 - IT Support and Definitions**

- 1.1 Progress or Company:** means Progress IT London Ltd of registered address 21 Aylmer Parade, Aylmer Road, London N2 0AT, and trading address at Offices 104 & 139, Building 3, North London Business Park, Oakleigh Road South, London, N11 1GN.
- 1.2 The Customer:** means the organisation that enters into the Agreement for the delivery of IT Support services (Demand / Active / Standard / Premium) with Progress. This will be the organisation to whom services will be delivered and/or IT Support Services and Invoices will be addressed to.
- 1.3 Agreement:** means a Service Level Agreement or Contract for the provision of IT Support services (Demand / Active / Standard / Premium) or other Services signed or agreed via email or in some cases verbally by both parties (Progress and the Customer). The Agreement declares that the Customer accepts the IT Support Terms and Conditions.
- 1.4 Support:** means any time spent by a Consultant or Engineer performing work covered by IT Support services (Demand / Active / Standard / Premium).
- 1.5 Incident:** means the request for Support and all the actions associated with it.
- 1.6 Incident Support:** means Support relating specifically to Incident requests as opposed to Support via IT Support services (Demand / Active / Standard / Premium) and other pro-active general assistance relating to the System.
- 1.7 System:** means the software, server(s), network or other item being maintained under the Agreement as defined in the Agreement.
- 1.8 Consultant(s) or Contracting Company:** means any technical personnel that Progress assign to provide Support to the Customer, whether employed on full time basis or hiring as part-time or for one off projects.
- 1.9 System Audit:** means an assessment of the System by a Consultant in order to gain the necessary understanding of the System for Progress to be able to supply the required Support and other packages.
- 1.10 IT Support Option(s):** means a range of additional service packages that can be purchased in addition to Incident Support to minimise the risk of business interruption caused by IT issues or to enhance the service delivered by Progress.
- 1.11 Response Time:** means the time specified by Progress within the relevant IT Support services (Demand / Active / Standard / Premium) in order to respond to an Incident as set out in clause 4.4.
- 1.12 On Site Support:** means the provision of Support services by Progress at the Customer Site(s)
- 1.13 Customer Site(s):** means the Site(s) at which the Customer operates the System defined in the Agreement.
- 1.14 Remote Support:** means the provision of Support services by Progress that is remote from the Customer's Site(s). Primarily this will be from Progress's offices or an engineer's remote and safe to use location.
- 1.15 Credits:** means pre-paid or included in the IT Support services Contract (all types such as Active / Standard / Premium) hours (on site and remote) that are used in return for Incident Support from Progress.
- 1.16 Account:** means the confidential file where the details of the Customer and the balance of the number of hours purchased or used by the Customer are held.
- 1.17 Agreed Credit Balance:** means the number of Credits purchased at the outset of the IT Support services (Active / Standard / Premium) Agreement that will be maintained by the payment of the monthly or annual Invoice.
- 1.18 IT Support Invoice:** means the invoice raised by Progress for the provision of Support as set out in section 8 below.
- 1.19 Overdraft:** means the facility provided by Progress to the Customer to receive On Site Support beyond the value of the Credits purchased to date which are held in the Customer's Account. These hours will be invoiced individually at the pre agreed hourly rate after each visit or time periods, until the renewal of the Agreement.
- 1.20 Overdrawn:** means that the Customer has received Support of a greater value to that of the Credits purchased to date, hence the Customer's Account is Overdrawn. When this scenario arises the Customer can either renew the Agreement or be invoiced individually at the pre agreed hourly rate after each visit, until the renewal of the Agreement.
- 1.21 Change:** means a modification that materially alters the System as defined in the Agreement.
- 1.22 IT Support Application:** means the software application which is used by Progress to setup and administer the Customer's IT Support services (Demand / Active / Standard / Premium) and record all actions and time in relation to Incidents.
- 1.23 IT Support Web Interface:** means the secure area of the Progress website available for Customers to view their Account details, Consultants' notes and charges in relation to Incidents.
- 1.24 Principal Contact:** means the person nominated by the Customer to act as its main representative. The Principal Contact is named in the Agreement and will receive official notices and important information and formal notices regarding IT Support services (Demand / Active / Standard / Premium) from Progress.
- 1.25 Authorised Caller(s):** means representatives of the Customer named in the Agreement that are able to log IT Support services (Demand / Active / Standard / Premium) Incidents. There is no restriction on changes to, or the number of Authorised Callers the Customer can name in the Agreement.
- 1.26 "Requirement":** means a booking for the supply of personnel on a time and materials basis.
- 1.27 "Deliverable":** means the item (solution, body of work or document) to be supplied by Progress. When a Deliverable is to be supplied by Progress an appendix will be attached to the Consultancy Services Booking Form describing / defining the Deliverable.
- 1.28 "Consultant(s)":** means the individual(s) being supplied for the Requirement or provision of a Deliverable.
- 1.29 "Working Day":** means any day from Monday to Friday (inclusive), which is not a statutory bank holiday. Progress's working hours are from 08:30 hours to 17:30 hours with one hour break.
- 1.30 "Buyer":** shall mean the person, organisation, firm or company from whom orders are received.
- 1.31 "Seller":** shall mean Progress IT London Ltd, with its registered offices situated at 21 Aylmer Parade, Aylmer Road, London N2 0AT and trading address at Offices 104 & 139, Building 3, North London Business Park, Oakleigh Road South, London, N11 1GN.
- 1.32 "Services" or "Goods":** shall mean range of installation, networking and maintenance services or products and materials offered by Progress IT London Ltd, as laid down in Quotation.
- 1.33 "Order":** shall mean an order placed with Progress IT London Ltd at their trading address at Offices 104 & 139, Building 3, North London Business Park, Oakleigh Road South, London, N11 1GN, as well as specifying the type of service to be supplied.

## **2.0 IT Support and Services**

**2.1** Progress provide IT Support services (Demand / Active / Standard / Premium) and the following services either as Incident Support or via IT Support services (Demand/ Active / Standard / Premium) packages:

- 2.1.1 Corrective action
- 2.1.2 System fault analysis
- 2.1.3 Status reporting
- 2.1.4 Application monitoring
- 2.1.5 System administration
- 2.1.6 Bug fixes
- 2.1.7 Evaluation of new hardware or software
- 2.1.8 Performance testing
- 2.1.9 Server Health checking
- 2.1.10 Real Time Remote Monitoring
- 2.1.11 On-line backup solutions
- 2.1.12 Specific services NOT covered by the Agreement
- 2.1.13 Procurement of new hardware, software

**2.2** Fixed price project work - At the discretion of Progress, work for items and issues beyond the scope of the System Definition in the Agreement will be performed upon request from the Customer. If deemed appropriate, such works will be performed by Progress under these Terms and Conditions. If not appropriate Progress retain the right to perform / charge for the work under different Terms and Conditions.

## **3.0 Getting Started**

**3.1** The Customer accepts responsibility for the status of their System prior to the involvement of Progress. Any System deficiencies resulting from poor management prior to the commencement of the IT Support services (Demand / Active / Standard / Premium) Agreement may lead to increased costs which are beyond the control and responsibility of Progress.

**3.2** Prior to the commencement of an IT Support services (Demand / Active / Standard / Premium) Agreement a System Audit will be performed. Any deficiencies found in the System Audit can be corrected for a fixed price. Alternatively they will be noted in the System Definition of the Agreement. The client is under no obligation to resolve the issues raised by the System Audit.

**3.3** The results of the System Audit presented in a report will allow Progress to recommend a number of Credits which upon acceptance by the Customer will form the Agreed Credit Balance.

**3.4** The report issued by Progress following the System Audit will also state any recommended IT Support services (Demand / Active / Standard / Premium) packages.

**3.5** Once payment is received for the Agreed Credit Balance, the Credits will be deposited into the Customer's IT Support services (Demand / Active / Standard / Premium). The Credits may then be exchanged for Incident Support as required.

**3.6** Progress retains the right to set a minimum Agreed Credit Balance depending upon the number of users within a Customer's organisation.

**3.7** Any IT Support services (Demand / Active / Standard / Premium) Option packages required by the Customer will be performed as scheduled in the Agreement and will be billed in arrears via IT Support services (Demand / Active / Standard / Premium) Invoices as stated in section 8 below.

## **4.0 Requesting Support**

**4.1** All requests for Support from the Customer must be made by Authorised Callers via telephone on 020 3358 0070 or e-mail on [support@progressit.london](mailto:support@progressit.london) or via the Progress IT Support Web Interface <http://www.progressit.london>

**4.2** If named as an Authorised Caller, there is no restriction on the amount of Support an individual may request, unless Progress have placed general restrictions upon the Customer's Account as per clause 8.10 below.

**4.3** By naming individuals as Authorised Callers the Customer agrees to incur costs or deduction of Credits for Incidents raised by those Authorised Callers and that the said individuals will have been made aware of the cost implications of raising Incidents under the Response Times stated below in clause 4.4.

**4.4** When logging an Incident the Authorised Caller representing the Customer MUST provide a description and state the required Response Time for the Incident. The Response Time stated must be in accordance with those listed below. The Response Times listed below only apply to Progress's working hours as stated in section 5.0 below:

4.4.1 Within 60 minutes (Immediate Response for Remote Support only)

4.4.2 Within 2 hours

4.4.3 Within 4 hours

4.4.4 Within 1 working day

4.4.5 Within 3 working days

4.4.6 Within 5 working days

4.4.7 Within 10 working days

**4.5** Upon receiving notification from an Authorised Caller regarding an issue with the Customer's System, the issue will be logged as an Incident with an allocated Incident reference number. The Incident reference number along with details of the Incident will be stated to the Authorised Caller in the form of an email or web page confirmation page.

**4.6** In circumstances when the Customer is not able to send or receive emails or web confirmations and therefore verbally notifies Progress of an issue, the Authorised Caller will be verbally informed by the Progress representative who logs the Incident as to the Incident reference number.

**4.7** In the event of the Customer wishing to query the progress of an Incident, the Customer must be able to state the specific Incident reference number to enable Progress to identify the Incident in question.

**4.8** Support delivered in respect of all Incidents (Incident Support) will be logged under the specific Incident reference number.

**4.9** Progress retains the right to perform Incident Support at any point within the requested Response Time. If the Customer cancels an Incident when work has already commenced, the time spent up to that point will remain chargeable.

- 4.10** The Response Time specifies the time within which Progress will begin work on the Incident and not the time for a fix for the Incident to be implemented.
- 4.11** When a Progress Consultant begins work on an Incident a further automatic email will be sent to the Customer stating that work has commenced on the Incident.
- 4.12** Whilst working on Incidents, Consultants will keep a record of the time they have spent and the actions taken. This information will be logged in the IT Support Application / Incident Report.
- 4.13** No guarantees or commitments will be given regarding the length of time required for resolving Incidents.
- 4.14** Due to the nature of the service provided via IT Support services (Demand / Active / Standard / Premium), Consultants regularly refer to colleagues for help and advice with specific issues in order to resolve Incidents as quickly as possible.
- 4.15** To ensure that Incidents are resolved as quickly as possible and to reduce the reliance on individual Consultants, Progress retain the right to allocate Consultants to Incidents and actions within Incidents as they see fit, depending on the skills, experience, and availability of Consultants.
- 4.16** Once the issue in question is resolved the Consultant will close the Incident in the IT Support Application. A final email will be sent to the Authorised Caller stating all times, notes and Credits used.
- 4.17** Upon closure of an Incident by a Consultant the appropriate number of Credits will be debited from the Customers' Account. The number of Credits debited for an Incident will be determined by the Response Time requested by the Customer and the number of minutes logged by the Consultant for that Incident in the IT Support Application.
- 4.18** In circumstances when the Consultant is unable to access the IT Support Application or when the Customer is unable to receive email, automatically generated e-mails may not be sent at all or will be sent later than the times specified within. Therefore email notifications are for information purposes only.
- 4.19** All Consultant notes and logged times are available to the Customer via email request.
- 4.20** The times logged in the IT Support Application which are available for the Customer to view relate to the Credits used and costs incurred by the Customer via their monthly IT Support Invoice.
- 4.21** If Progress fail to meet a Response Time (which has been by Progress) for an Incident Support, then the specific Incident in question will be performed free of charge but this does not include the supply of hardware, software, or the services of third parties. For the avoidance of doubt, only time spent by a Progress Consultant related to the Incident is free of charge.
- 4.22** If Incident Support is delivered later than a requested Response Time due to a specific request from the Customer, all time spent on the Incident will remain chargeable.
- 4.23** Remote Support will be delivered when possible. Consultants will gain remote access to the System to investigate faults and implement the necessary fix. When the Customer seeks Support in the form of advice/instruction it will be provided via telephone or email.
- 4.24** The Customer accepts that in certain circumstances a Consultant will have to make an On Site visit in order to implement the required fix or to fully diagnose the Incident in question.
- 4.25** When On Site Support following Remote Support is not necessary or possible immediately (e.g. delivery of a vital piece of equipment is being awaited); the On Site Support will be charged at the subsequent slower Response Time according to the time agreed with the Customer for the On Site visit.
- 4.26** If the Customer specifically requests On Site Support for any Incident as opposed to Remote Support, Progress will oblige. The Customer accepts that this may lead to higher costs as a result of the pricing structure detailed in section 8.0 below.

## **5.0 Availability of Support**

- 5.1** Progress's standard working hours for Support services are 08:30 – 17:30 hours Monday to Friday.
- 5.2** Calls for Support will be taken and Support will be provided between the hours of 08:30 – 17:30 hours Monday to Friday (EXCLUDING PUBLIC HOLIDAYS) unless expressly stated otherwise in the Service Level Plan.
- 5.3** Consultants will work on varying shift patterns within the hours stated above. This means that individual Consultants do not work from 08:30 to 17:30 hours on a daily basis.

## **6.0 IT Support Service Level Plans and packages**

- 6.1** IT Support Service Level Plans and packages are a range of services that are supplied in addition to Incident Support. Option packages will be agreed with the Customer prior to being included within their IT Support services (Demand / Active / Standard / Premium).
- 6.2** Any IT Support Service Level Plans may be added to the Agreement upon request from the Customer with immediate effect. The signing of an Agreement Annex in addition to the main Agreement will be required for the Option package to be added to the IT Support services (Demand / Active / Standard / Premium).
- 6.3** The full Terms and Conditions for each available Option package are included below and within this document as part of these main Terms and Conditions.
- 6.4** The terms of termination for each Option package will be stated in the relevant S.L.P. or Agreement Annex.
- 6.5** In such circumstances when an Option package requires a third party licence agreement or a minimum contract period with specific termination requirements, the Option package will continue for the minimum period regardless of whether any other items of the IT Support services (Demand / Active / Standard / Premium) are cancelled or terminated.
- 6.6** When IT Support services (Demand / Active / Standard / Premium) is cancelled but an Option package remains in place, the full fees and charges relating to the Option package will remain payable by the Customer up to the end of the contractual period.
- 6.7** If the necessary termination notice, as stated in the relevant Annex of these Terms and Conditions has not been provided, the Option package may continue with all charges applicable for a further minimum contract period.
- 6.8** The price of each Option package will be determined by the needs of the Customer and the size of their System.
- 6.9** When applicable the agreed fees for IT Support services (Demand / Active / Standard / Premium) Option packages will be billed in arrears via IT Support services (Demand / Active / Standard / Premium) on Demand Invoices as per section 8 below.
- 6.10** Progress retains the right to add new IT Support services (Demand / Active / Standard / Premium) Option packages to its range of services at any time.
- 6.11** The Terms and Conditions for new IT Support services (Demand / Active / Standard / Premium) Option packages will be added to these main Terms and Conditions as Annexes on an "as required" basis. The addition of such Annexes will NOT be deemed as a change to these Terms and Conditions that warrants formal notification as stated in sections 18.0 and 19.0 below.

## **7.0 Changes to your IT System**

**7.1** The Customer retains overall responsibility for their IT System. Any Changes made to the System by the Customer or a third party will only be covered by the Agreement once approved by Progress.

**7.2** For such a Change as set out above to be approved, Progress must receive appropriate details from the Customer in a timely fashion.

**7.3** If accepted the Changes will be noted or added to the existing Agreement.

**7.4** Any changes performed by Progress to the System will automatically be covered by the Agreement once any bedding down or warranty periods have expired if applicable. Bedding down periods and Warranties apply to fixed price project work only and as such are covered by separate Terms and Conditions included or to be added to these Terms and Conditions.

**7.5** If Support is required for an unapproved System Change or another System, Progress will endeavour to provide Support under these Terms and Conditions. However Progress retain the right to refuse Support or impose additional charges as shall be deemed necessary at the time.

## **8.0 Account Information and Invoicing and Payments**

**8.1** Progress Invoices will be raised on the first working day of each Agreement and be repeated each calendar month or each quarter or in full and in advance of the covered period (subject to the Agreement but all payable in advance) and will consist of:

**8.1.1** The fee for the number of Credits required to bring the Account back to the Agreed Credit Balance; i.e. The total number of Credits that apply to all Incidents closed during the previous month.

**8.1.2** The agreed fee for any IT Support services (Demand / Active / Standard / Premium) Option packages delivered during or relating to the previous month.

**8.2** The applicable price of IT Support services (Demand / Active / Standard / Premium) Credits at any given time will be stated on an email sent out to the Customer either when requested or periodically. As per section 18 below, Progress retain the right to revise the price of Credits or the number of Credits charged per hour from time to time. In the event of a change in pricing, formal notice will be provided to the Customer by Progress as stated herein.

**8.3** For Incident Support, time segments will be billed in full if only part of the time segment has been spent by a Consultant providing Incident Support.

**8.3.1** Remote Support is billed in 15-minute time segments. The minimum billing period for Remote Support is 15 minutes for Customers under S.L.P. Agreements but for Demand supported Customers this minimum billing period increases to 30 minutes.

**8.3.2** On Site Support is billed in 1 hour time segments. The minimum billing period for On Site Support is 2 hours plus travel time and expenses, unless otherwise stated in an S.L.P. Agreement with the Customer.

**8.4** The Customer will be invoiced for IT Support services (Demand / Active / Standard / Premium) on a monthly, quarterly or annual basis. All IT Support services (Demand / Active / Standard / Premium) Invoices must be paid by the Customer promptly on or just after the invoice date. Progress reserve the right to recover on a full indemnity basis any costs incurred collecting overdue payments.

**8.5** When Customers choose to pay for IT Support services (Demand / Active / Standard / Premium) using Standing Order or BACS, monies shall be paid to Progress promptly on or around the anniversary of the Agreement in each month or quarter.

**8.7** When IT Support services (Demand / Active / Standard / Premium) Invoices are paid on time, the requested level of Support for future Incidents will be delivered regardless of the number of Credits in the Customer's Account. (i.e. the Customer may become Overdrawn without any penalties or restriction to service.)

**8.8** When the Customer's Account becomes Overdrawn, the necessary number of Credits to return the Account to the Agreed Credit Balance will be invoiced via the following or next monthly Invoice or as separate Invoice.

**8.9** If the Customer is continually Overdrawn Progress retains the right to increase the Agreed Credit Balance. The Credit increase will be equivalent to the average of the Customer's Overdraft over the past three months.

**8.10** If IT Support services (Demand / Active / Standard / Premium) Invoices remain unpaid:

**8.10.1** Progress retain the right to limit the level of Support on an on-going basis to reflect the positive number of Credits available in the Customer's Account (i.e. the Overdraft facility will be removed or capped).

**8.10.2** A Consultant, upon instruction from Progress, may not be able to conclude the Support required for particular Incidents, as the necessary Credit balance is not available (due to the unlimited Overdraft facility being removed or capped).

**8.10.3** Services associated with IT Support services (Demand / Active / Standard / Premium) packages can be put on hold if payment for Invoice(s) are overdue.

**8.11** For work performed on behalf of UK registered organisations all amounts invoiced will be subject to VAT payable at the then prevailing rate.

**8.12** Late settlement of any outstanding invoices over the 60 day periods (where Progress terms of payment are normally set to either 14 or 30 days grace period), will incur an additional annual charge calculated at 8% above the current bank rates to be added to the originally invoiced amount, as set out by the Late Payments of Commercial Debts Regulations Act 2013

## **9.0 Complaints**

**9.1** In the event that the Customer is dissatisfied with the quality or performance of a Consultant, the Customer shall inform Progress immediately, stating the basis for dissatisfaction. If, in the view of Progress, the situation merits it, Progress will withdraw the Consultant immediately and will use all reasonable endeavours to provide a replacement.

**9.2** In the event of a complaint by the Customer in respect of work performed by a Consultant, in terms of time taken or methodology and techniques used, the Customer shall notify Progress immediately and no later than 5 working days after the completion of the Support. Failure to notify Progress of such an issue within this time will absolve Progress from any liability in this respect. Any other complaint by the Customer in respect of any other aspect of the work shall be notified as soon as the fault in question is found.

## **10.0 Term of Agreement**

**10.1** The Agreement between the Customer and Progress, with the exception of Option packages with specific contractual periods, is perpetual and will only cease upon termination by the Customer or Progress in accordance with section 11.0 below.

## **11.0 Termination of Agreement**

**11.1** The Customer may cancel the Agreement, (with the exception of any Option packages with specific contractual periods) at any time upon provision that Progress shall be notified with full thirty (30) days written notice prior to monthly anniversary.

**11.2** In such circumstances all Credits in the Customer's Account at the point of termination (i.e. after 30 days) will be negated and are non-refundable. Any excess hours used, given that hours are allocated on a pro rata basis are payable at our standard hourly rates on termination alternatively the customer may opt to continue with the contract until such time that the allotted hours already expended by the Customer are brought into balance against the time period remaining in contract. In other words the Customer will have to remain into contract for a further period so that the excess hours are fully justified.

**11.3** At the end of the notice period the Customer's Account will be terminated unless Overdrawn.

**11.4** When Overdrawn the termination will only process upon receipt of all monies owed in full; i.e. The Customer's Account balance must be a minimum of zero and all IT Support services (Demand / Active / Standard / Premium) packages for which work has been performed must be paid.

**11.5** Progress can terminate the Agreement with notice of 30 days in writing. The value of any Credits left in the Customer's Account at the point of termination will be paid by Progress to the Customer in full.

**11.6** Progress can terminate the Agreement or any aspect of it, including any / all IT Support services (Demand / Active / Standard / Premium) at any time if the Customer becomes the subject of a receivership winding up administration or bankruptcy order (or a petition is presented in respect of any of these). Or, if it otherwise appears to Progress that the Customer is insolvent and unable to pay its debts as they fall due.

**11.7** Progress shall also be entitled to terminate any Agreement or service with immediate effect in the event that the Customer commits a material breach of this Agreement or acts in any way deemed as unreasonable or unacceptable.

**11.8** Any termination shall be without prejudice to Progress's other rights or to the Customers' liability for amounts payable under this agreement.

## **12.0 Intellectual Property Rights**

**12.1** Intellectual property rights in respect of Network Infrastructure Solutions including Hardware, Operating Systems and 3rd Party Software:

**12.1.1** The System shall remain the property of the Customer and legal ownership shall remain vested in it along with any future Changes made to the System under the Agreement.

**12.1.2** Any System documentation created under the Agreement is the property of the Customer. This will be provided to the Customer upon request as long as the Customer's Account is not in negative balance and/or being disputed.

**12.1.3** The knowledge and expertise that Progress possess in order to perform Support as required / requested by the Customer will inherently remain vested in Progress and the Consultant(s) in question.

**12.2** Intellectual property rights in respect of any Software built by Progress:

**12.2.1** When ownership of the Software remains vested in Progress:

**12.2.1.1** All Intellectual Property Rights and copyright relating to the System that is licensed to the Customer shall remain vested in Progress in accordance with the license that has been granted by Progress for the use of the System by the Customer.

**12.2.2** When ownership of the Software is transferred to the Customer:

**12.2.2.1** No part of the System may be reproduced or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in a retrieval system, by Progress without the prior written permission of the copyright owner (the Customer).

**12.2.2.2** The intellectual property rights and copyright and all other confidential information in the development of a Change shall vest in Progress until approved by the Customer.

**12.2.2.3** Upon receipt of the Customer's approval/acceptance for a Change and upon payment from the Customer for all associated charges, Progress will assign the intellectual property rights and copyright relating to that Change, to the Customer.

## **13.0 Warranty**

**13.1** Progress warrant that Support will be performed in a professional and workmanlike manner in accordance with generally accepted industry standards.

**13.2** Progress warrant that it will have and maintain the necessary technical skills and knowledge to Support the System defined in the Agreement.

**13.3** Progress does not warrant that the operation of the Customer's System will be uninterrupted or error free over any specified period of time.

**13.4** Progress does not warrant the performance of third party Hardware and Software. Advice and Support from third party manufacturers will be sought where necessary and when available. Progress has partnership agreements with key suppliers and manufacturers to enable such Support to be obtained but cannot warrant the quality or accuracy of advice and Support received from 3rd parties.

#### **14.0 Limitation of Liability**

**14.1** The liability of Progress for any loss or damage of whatsoever nature and howsoever caused shall be limited to and in no circumstances shall exceed the aggregate price paid for the services under the IT Support services (Demand / Active / Standard / Premium) Agreement up to the date in question.

**14.2** In no event shall Progress, its partners or suppliers be liable for costs of substitute goods or services, nor will they be liable for loss of profits, loss of data or any indirect, special, incidental, consequential or punitive damages however caused, whether due to a breach of contract, negligence or otherwise unless such liability is determined by a Court of competent jurisdiction, without further recourse to appeal, that it was caused by gross negligence, wilful misconduct or fraudulent acts by Progress.

#### **15.0 Confidentiality**

**15.1** Each party undertakes to the other to treat all information (in any form) exchanged in relation to the Agreement as confidential for the period of the contract and beyond.

**15.2** Progress and/or any of its employees with access on-site or remotely to the client's database and other forms of information which may include sensitive data kept for the Customer's own operations shall not during the time of its engagement or at any time after the termination date, use or disclose to any firm, person or company any confidential information and undertakes to never disclose, divulge or manipulate in any way any of the above.

**15.3** Progress recognizes and confirms that the content of all Customers Servers or PCs data sent to or received from the Customer by Progress is confidential. In the normal provision of the Service Progress will not access, read or copy any data as such or Emails or their attachments other than by electronic methods for the purposes of providing the Service. However, Progress and its partners or third parties reserves the right to utilize the Virus-related content of such data or Email or its attachments solely to:

- a) maintain and improve the performance and the integrity of the Service;
- b) comply with all regulatory, legislative or contractual requirements; and
- c) make available to Service subscribers any information passing through the Service which may be of interest to them, solely for the purpose of further developing and enhancing the Service, provided that information provided by Progress does not include any Customer- identifiable information.

#### **16.0 Solicitation**

**16.1** The Customer will make no approach or offer relating to employment to a Consultant or any other employee of Progress during the period of the Agreement.

**16.2** Upon termination of the Agreement, the Customer agrees not to engage any Consultant or employee introduced by Progress in any form without the written consent of Progress.

**16.3** Progress reserves the right to charge the Customer if a Progress Consultant or employee is engaged in full time employment by the Customer or by any 3rd party introduced by the Customer. It is agreed the Customer shall pay an introductory fee to Progress the equivalent of 150% of the annual remuneration package (including benefits and commission) of the Consultant or employee in question.

#### **17.0 Force Majeure**

**17.1** Neither party to this Agreement shall be deemed to be in breach of this Agreement or otherwise liable to the other party in any manner whatsoever for any failure or delay in performing its obligations under this Agreement, if it is due to any event beyond the reasonable control of a party to this Agreement which shall include, without limitation, strikes, lockouts or other industrial disputes (whether involving the workforce of the party so prevented or any other party) act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown, container shortages, wrecks or delays of plant or machinery, fire, flood, or storm or default of suppliers or sub-contractors.

**17.2** Each of the parties agrees to give notice to the other upon becoming aware of an Event of Force Majeure. Such notice must contain details of the circumstances giving rise to the Event of Force Majeure.

**17.3** If a default due to an Event of Force Majeure shall continue for more than twelve (12) weeks then the party not in default shall be entitled to terminate the Agreement. Neither party shall have any liability to the other in respect of the termination of the Agreement as a result of an event of Force Majeure.

#### **18.0 Changes to the Price of IT Support for on Demand Services**

**18.1** Progress retains the right to review the price of Credits or the number of Credits charged per hour from time to time. Progress undertakes to inform the Customer of any such alterations with 30 days written and email notification to the Principal Contact.

**18.2** In the event of a change in price, all Credits purchased prior to the change in price will remain valid at the price they were purchased.

**18.3** In the event of a change in the number of Credits charged per hour, the new charges will apply to all Incidents closed after the date of introduction of the new charges.

**18.4** Progress retains the right to review the price of Changes to the Price of IT Support Services from time to time. Progress undertake to inform the Customer of any such alterations with 30 days written and email notification to the Principal Contact.

**18.5** If the Customer objects to a change in price, they have the right to terminate the IT Support contract in question OR the entire Agreement upon the provision of 30 days notification in writing as per section 11.0 above.

## **19.0 Changes to the Terms and Conditions of IT Support on Demand**

**19.1** Progress retains the right to review these Terms and Conditions from time to time. With the exception of changes and additions to Annexes as stated in clause 6.6 above, Progress undertake to inform the Customer of any such alterations with 30 days notification via email to the Principal Contact.

**19.2** The new altered Terms and Conditions will be posted or emailed to the Customer or displayed on the Progress website [www.progresscomms.co.uk](http://www.progresscomms.co.uk) along with the existing Terms and Conditions for the 30 day notice period.

**19.3** Following the 30 day notice period provided, the alterations will come in to effect and the new Terms and Conditions will become applicable. For the avoidance of doubt the current applicable Terms and Conditions for IT Support contracts will always be displayed on [www.progresscomms.co.uk](http://www.progresscomms.co.uk).

**19.4** The Customer is responsible for being aware of the applicable Terms and Conditions for IT Support contracts as displayed on [www.progresscomms.co.uk](http://www.progresscomms.co.uk).

**19.5** If the Customer feels unable to adhere to the altered Terms and Conditions, they have the right to terminate the Agreement upon the provision of 30 days notification in writing as per section 11.0 above

## **20.0 Entire Agreement**

**20.1** The Agreement supersedes all prior Agreements made between Progress and the Customer for the provision of Support services and constitutes the entire Agreement between the parties relating IT Support contract.

**20.2** The Agreement does not supersede Progress's full Terms and Conditions or Agreement of any other business activities that the parties are or have been engaged in or may be engaged in the future.

**20.3** No addition to or modification of any provision of these Terms and Conditions shall be binding upon the parties, except as set out herein, unless made in writing and signed by a duly authorised representative of each of the parties.

**20.4** If any term, clause or condition of these Terms and Conditions is in violation of any applicable law, statute or regulation, the term, clause or condition in question shall be deemed as being deleted without effect to the remainder of these Terms and Conditions.

**20.5** These Terms and Conditions shall remain in full force as if the deleted term, clause or condition had not been included. Progress and the Customer will negotiate, in good faith, alternative terms, clauses or conditions to those deleted that are mutually acceptable to both parties.

**20.6** Headings are included for convenience only and shall not affect the interpretation of these Terms and Conditions or the Agreement.

## **21.0 Notice**

**21.1** Any notice given under the Agreement by the Customer to Progress shall be provided in writing by post or fax as set out below: Postal address: Offices 104 & 139, Building 3, North London Business Park, Oakleigh Road South, London, N11 1GN. Fax Number: 0872 1133 580

**21.2** Any notice given under the Agreement by Progress to the Customer shall be provided to the Customer as set out herein and in accordance with the contact details for the Customer stated in the Agreement. The Customer may change its contact details from time to time if required, by the provision of notice to Progress.

## **22.0 Server Health Checking**

**22.1** When required by the Customer, the definition, price and frequency of the Server Health Checking package for the Customer's System will be stated within the Agreement description.

**22.2** The Server Health Checking package will be billed in arrears when applicable as a separate line item on the Customer's monthly Invoice.

**22.3** The Health Checks performed on the Customer's Server(s) may need to differ from that stated within the Agreement at times depending on the requirements of the System in question.

**22.4** For each Server Health Check performed a report will be issued to the Customer's Principal Contact/s to specify exactly what has been checked and the results and recommended actions resulting from those checks.

**22.5** Server Health Checking is designed to discover and highlight issues to the Customer only. Any work required to rectify any issue should be raised by the Customer as an Incident.

**22.6** The Customer may request changes to the Server Health Checking package. Such changes will need to be confirmed by the Principal Contact/s named in the Agreement.

**22.7** Depending on the nature of the changes requested by the Customer to the Server Health Checking package, Progress reserve the right to adjust fees accordingly. Once agreed, the changes and associated fees will be updated in the Agreement and re-signed by both parties. (Progress and the Customer)

**22.8** Server Health Checking can in no way ensure the continuous operation and status of the System and its component elements. The purpose of Server Health Checking is to identify issues and make the Customer aware of them.

**22.9** The price for both Remote and On Site Server Health Checking will be stated in the Agreement. By default Remote Health Checking will always be performed. In the event that it is not possible to perform the Health Check remotely, the Customer will be contacted and a convenient time for On Site Health Checking will be arranged and subsequently the higher charge will apply.

**22.10** Server Health Checking can be cancelled at any time with 30 day notice. Cancellation of Server Health Checking has no effect upon other aspects of the Agreement which will remain in place.

## **23.0 Real Time Remote Monitoring (add-on package)**

**23.1** Progress will provide a proactive Real Time Remote Monitoring service, herein referred to as "Remote Monitoring" based upon a software agent that will be installed on the Customer's server(s) to continually monitor critical aspects of the Customer's IT System. This is an additional package which can be requested and will be billed in arrears when applicable or requested by the Customer as a separate line item on the Customer's monthly Invoice.



**23.2** The Remote Monitoring Option package is only available to Customers who have periodic Server Health Checking performed on a quarterly or more frequent basis.

**23.3** Progress Consultants will only react to alerts generated by the Remote Monitoring software during standard Support hours between 08:30 and 17:30 hours Monday to Friday (excluding public holidays).

**23.4** If required the Customer can opt for alerts to be sent to an alternative email address (other than Progress) outside of Progress's standard hours of Support.

**23.5** If, having received an alert outside of standard Support hours, the Customer can only request Support from Progress if they have the Out of Hours 24/7 Option package.

**23.6** If a Customer has the Out of Hours 24/7 Option package they will need to contact the Out of Hours Consultant to log a Support Incident. In such circumstances when Support is requested, the provision of Support will be in accordance with the Terms and Conditions for the Out of Hours 24/7 Option package.

**23.7** The Remote Monitoring Option is available as a bespoke or a standard package.

**23.8** A one off fixed fee for setting up the Remote Monitoring software will be charged. The fee will be agreed in advance depending on the size and nature of the Customer's network. The setup fee will be stated in the Agreement.

**23.9** A set monthly fee for providing the service on an on-going basis will be charged. The monthly fee will be dependent on the size and nature of the Customer's network and will be stated in the Agreement.

**23.10** When the Customer requires a bespoke Remote Monitoring package there will be a consultation process to highlight / agree the System services that require monitoring.

**23.11** Whether the Customer opts for a bespoke or standard package, when a specified remotely monitored service returns an error, Progress will perform an initial assessment of the alert and classify it as either a critical or a non critical issue.

**23.12** It is not possible to define what is "critical" and therefore the judgement of the Consultant will prevail in determining when an error is deemed as critical.

**23.13** When Progress receives an alert that is deemed as critical, the following procedure will be followed:

23.13.1 The Customer's Primary Contact will be called. The problem will be explained and the Primary Contact can then decide the course of action required i.e. whether or not to log an Incident and under what Response Time.

23.13.2 If the Primary Contact is not available one other Authorised Caller chosen at the discretion of Progress will be called. The problem will be explained and the Authorised Caller can then decide the course of action required. i.e.: Whether or not to log an Incident and under which Response Time.

23.13.3 If neither the Primary Contact nor the Authorised Caller contacted are available, Progress will log the Incident under an immediate Response Time in the name of the Primary Contact and proceed to rectify the problem.

**23.14** When Progress receive an alert that is deemed as non critical, the following procedure will be followed:

23.14.1 The Customer's Primary Contact will be called. The problem will be explained and the Primary Contact can then decide the course of action required i.e. whether or not to log an Incident and under which Response Time.

23.14.2 If the Primary Contact is not available one other Authorised Caller chosen at the discretion of Progress will be called. The problem will be discussed and the Authorised Caller can then decide the course of action required i.e. whether or not to log an Incident and under which Response Time.

23.14.3 If neither the Primary Contact nor the Authorised Caller contacted are available, Progress will log the Incident as a within 1 working day Response Time, in the name of the Primary Contact and proceed to rectify the problem.

**23.15** If the Customer wishes to cancel work being performed on an automatically logged Incident, they can do so at any time and Progress will cease work. The work performed up to the point of cancellation will remain chargeable.

**23.16** If the Customer wishes, they can opt for issues not to be automatically logged as Incidents as a result of Remote Monitoring alerts. In such cases, when the Primary Contact and the chosen Authorised Caller are not available, an email will be sent to the Primary Contact and chosen Authorised Caller explaining the nature of the issue. Progress will then wait for direction before acting.

**23.17** Having been made aware of an issue, the onus to log an Incident lies with the Customer. However when there is no action is taken to rectify the issue, alerts will continue to be raised by the Remote Monitoring software. If no response is received from the Customer, Progress will attempt to make contact again within a period of time deemed as appropriate for the severity of the issue.

**23.18** The standard Remote Monitoring package will include the following checks that are relevant to the Customer's system. In the list below a "Windows Service" means an executable program or process running on the server.

23.18.1 Exchange Mail Server Operational

23.18.1.1 All of the Windows Services associated with Microsoft Exchange Server will be monitored to ensure they are operational

23.18.1.2 Periodicity of Checks - Every 5 Minutes

23.18.1.3 Failure Trigger - Following 3 Successive Failures

23.18.2 All of the Windows Services associated with the AntiSpam System will be monitored to ensure they are operational

23.18.2.1 Periodicity of Checks - Every 30 Minutes

23.18.2.2 Failure Trigger - Following 3 Successive Failures

23.18.3 End-2-End Email Test

23.18.3.1 An e-mail be sent from Octavia and then Retrieved using POP (Post Office Protocol) to confirm successful receipt

23.18.3.2 Periodicity of Checks - Every 10 Minutes

23.18.3.3 Failure Trigger - Following 3 Successive Failures Backup Services

23.18.4.1 All of the Windows Services associated with the Backup System will be monitored to ensure they are operational

23.18.4.2 Periodicity of Checks - Twice Daily AM and PM

23.18.4.3 Failure Trigger - Following 1 Failure

23.18.5 AntiVirus Update System

23.18.5.1 All of the Windows Services associated with the AntiVirus Update System will be monitored to ensure they are operational

23.18.5.2 Periodicity of Checks - Every 30 Minutes

23.18.5.3 Failure Trigger - Following 3 Successive Failures

23.18.6 AntiVirus Services

23.18.6.1 The AntiVirus Services on all Servers will be monitored to ensure they are operational

23.18.6.2 Periodicity of Checks - Every 5 Minutes

- 23.18.6.3 Failure Trigger - Following 3 Successive Failures
- 23.18.7 Windows Scheduler
  - 23.18.7.1 The Windows Scheduler Service, where configured with scheduled tasks, will be monitored to ensure it is operational
  - 23.18.7.2 Periodicity of Checks - Every 30 Minutes
  - 23.18.7.3 Failure Trigger - Following 3 Successive Failures
- 23.18.8 Disk Space
  - 23.18.8.1 Free Disk Space on all drives will be monitored to detect disks which are running low on free space
  - 23.18.8.2 Periodicity of Checks - Every 60 Minutes
  - 23.18.8.3 Failure Trigger - Following 3 Successive Failures
- 23.18.9 Web site Availability
  - 23.18.9.1 An HTTP Request will be made to the Corporate Web Site to determine that the site is active.
  - 23.18.9.2 The optional customised service allows for further checks to be made such as website database connectivity, website e-mail functionality, etc.
  - 23.18.9.4 Failure Trigger - Following 3 Successive Failures
  - 23.18.9.5 This check will confirm that the website is accessible from Progress location, it does not guarantee that all of the site is accessible from every location
- 23.18.10 UPS Monitoring
  - 23.18.10.1 The UPS Monitoring Service will be monitored to ensure it is operational
  - 23.18.10.2 Periodicity of Checks – Every 60 Minutes
  - 23.18.10.3 Failure Trigger - Following 3 Successive Failures
- 23.18.11 Internet Connectivity
  - 23.18.11.1 An echo test packet will be sent to the internet connection device( s). A reply will be expected within 1000ms.
  - 23.18.11.2 Periodicity of Checks - every 5 minutes
  - 23.18.11.3 Failure Trigger - 3 consecutive "no replies"
  - 23.18.11.4 For known slow connections the reply period may be increased
- 23.19** In certain circumstances due to connectivity issues which are beyond the control of Progress, the Remote Monitoring software may not function as required. It will usually take one calendar month following installation to assess whether the software is functioning correctly.
- 23.20** When the software is not working correctly and the Customer does not wish to resolve the connectivity issue causing the problem, Progress will remove the software agent and cease to provide the Remote Monitoring service to the Customer. In such circumstances Progress will refund all the monthly charges levied in respect of the service to date.
- 23.21** The Remote Monitoring software is a third party software product, which will be licensed by Progress on your behalf. By signing the Agreement Annex the Customer accepts the full Terms of the any such licence agreement.
- 23.22** Remote Monitoring will be charged in arrears via Invoices for months when Remote Monitoring is in operation.
- 23.23** Remote Monitoring can be cancelled at any time with 30 day notice. Cancellation of Remote Monitoring has no effect upon other aspects of the Agreement which will remain in place.
- 23.24** If Remote Monitoring is cancelled and then requested again at a later date, the setup fee will be chargeable again.

#### **24.0 Out of Hours Support (24/7 cover – optional package)**

- 24.1** Progress will provide remote telephone Support known as "Out of Hours" Support to Authorised Callers named in the Agreement beyond Progress's standard working hours.
- 24.2** Out of Hours Support will be available between the Hours of 17.30 and 08:30 hours Monday to Saturday and 08:00 to 20.00 hours over weekends with the exception of Christmas Eve and New Year's Eve.
- 24.3** Out of Hours Support will be provided as standard during Public Holidays between the hours of 08.00 to the following day at 20.00 hours with the exception of Christmas Day, Boxing Day and New Year's Day.
- 24.4** Each set of hours outside of Progress's standard working hours will be referred to as an "Out of Hours" period.
- 24.5** Out of Hours 24/7 Support will be invoiced as a separate line item on Invoices.
- 24.6** The telephone number that must be used by the Customer during Out of Hours periods is: 020 3358 0070
- 24.7** During Out of Hours periods Progress guarantees that duty Consultants will be available to respond to issues relating the Customer's System via the telephone. No On Site Support will be available, unless urgency qualifies these visits.
- 24.8** Progress cannot guarantee that duty Consultants during Out of Hours periods will be from the usual Customer Team that the Customer in question is usually serviced by during standard Support hours.
- 24.9** During Out of Hours periods Progress Consultants will not take receipt of any physical items or perform work on physical items on behalf of the Customer unless agreed as a matter of urgency.
- 24.10** If Out of Hours Consultants are otherwise engaged when the Customer calls, a messaging facility will ensure that a Consultant is notified as soon as possible.
- 24.11** There is no limit to the number of Support calls that can be logged by a Customer during an Out of Hours period.
- 24.12** All Out of Hours period Support calls received by Consultants will be logged as an Immediate Response Incident (within 30 minutes) and charges will be levied accordingly. Slower Response Times will not be available for Incidents during Out of Hours periods.
- 24.13** Consultants on duty during Out of Hours periods will have access to a PC with the ability to remotely connect to the Customer's System. The Consultant will attempt to connect remotely when appropriate.
- 24.14** Progress cannot guarantee that the remote connection to the Customer's System will always be available during Out of Hours periods due to issues with the Customer's system or other external factors with 3rd party suppliers beyond the control of Progress (e.g. Internet Service Provider problems).
- 24.15** When Remote Support cannot resolve the Incident and On Site Support is required, the On Site visit will be arranged for the soonest available point in time during Progress's standard Support Hours 08.00 - 18.30 hours Monday to Friday.
- 24.16** Charging for Out of Hours Support is based on the number of servers and workstations within the System to be covered and the anticipated demand by the Customer.
- 24.17** Out of Hours Support will be charged in arrears via Invoices for months when Out of Hours Support has been available to the Customer.

**24.18** The Out of Hours 24/7 Option package can be cancelled at any time with 30 day notice. Cancellation of the Out of Hours 24/7 Option package has no effect upon other aspects of the Agreement which will remain in place.

## **25.0 Data Secure - Online Backups**

**25.1** Definitions specific to the provision of Online Backup Services.

**25.2** Software means all or any computer programs sold or leased by Progress to you specific to the purposes of providing Online Backup Services, whether such programs are produced by Progress, or are sold or leased as distributor or agent of a third party whether by licence or through the public domain.

**25.3** The Service(s) means the Online Backup Option package as outlined in these Terms and Conditions.

**25.4** SLA means the Service Level Agreement for Online Backup services as stated in the Agreement which dictates the availability of the Services and the rebates awarded to Customers if the stated availability is not met.

**25.5** Software Support means all reports of Software faults or queries, in relation to the Software and its operation. This is distinct from other types of Support delivered via the service.

**25.6** Business Day means any day within the year, excluding weekends (Saturday, Sunday) and public holidays.

**25.7** Allocated Limit means amount of storage allocated to the Customer's data on the Data Storage Centre system

**25.8** Data Storage Centre means the remote, secure IBM managed location where backed up data will be stored maintained.

**25.9** Progress's Online Backup Option package sometimes relies upon third party associates for the provision of software and the management of the Data Storage Centre. In agreeing to these terms and conditions, the Customer is accepting the full terms of the third party's software license.

**25.10** The Data Secure - Online Backup option package runs for a minimum period of twelve months. The provision of the Services shall commence on the date specified in the Agreement and shall, subject to the other provisions which may cause termination of the contract by Progress, continue for a minimum period of twelve (12) months regardless of whether any other items of the Agreement are cancelled or terminated.

**25.11** If at any stage during the contract period, the Customer wishes to have data from additional servers added to the Agreement, a new Agreement specific to those server(s) / data will need to be signed or agreed. Any additional Agreements will commence of the day specified in the new Agreement and will be subject to minimum period of twelve (12) months from that point in time regardless of whether any other items of the Agreement are cancelled or terminated.

**25.12** The parties acknowledge and accept that certain data will be supplied by the Customers to Progress which will be placed on third party's servers ("Data").

**25.13** The Customer acknowledges and accepts that Progress does not, in particular, carry out any screening of the Data (as may be amended from time to time) and the Customer is solely responsible for access to and any use of the Data pursuant to the Product Terms. Progress hereby excludes all or any liability from and against any costs (including legal costs), expenses, damages, liabilities and against any direct, indirect and/or Consequential Loss (which includes, without limitation, economic loss, loss of profit, loss of goodwill, loss of revenue and like loss) which the Customer suffers or incurs directly or indirectly in relation to or as a consequence of: access to or use of the Data, the Products, and/or any Upgrades by any Customer, or any third party; and any information, data or material produced or supplied by a Customer (including the Data) to Progress or any Partner.

**25.14** The parties acknowledge and agree that the provisions of the Product Terms shall apply *mutatis mutandis* to this Agreement.

**25.15** In accordance with these Terms and Conditions, the Customer will be offered the use of third party Online Backup Software to securely backup and retrieve their data on-line via any TCP/IP connection to the Online Backup Data Storage centre, where such backed up data will be stored.

**25.16** The Data Secure - Online Backup storage data centre is managed and hosted by a third party in a secure environment.

**25.17** Progress will set up the Data Secure - Online Backup Software and liaise with the Customer to select and schedule their backup set.

**25.18** After the initial backup, incremental backups are done on a daily basis. This enables customers to restore data from any time within up to the last fourteen (14) days dependent on storage usage.

**25.19** When the Service is operational all reasonable efforts will be made to ensure that the Service is maintained and fully available to you 24 hours x 365 days per year. Notwithstanding the foregoing, in the event that in any calendar month the service availability is less than 99.5% of time (calculated on a 24 hour basis), you shall be entitled to rebates as specified in the SLA below.

**25.20** The charges set out in the Agreement are non-refundable (except when Progress fails to meet its obligations in respect of the SLA and for a minimum period of twelve (12) months from the date of commencement stated in the Agreement.

**25.21** The charges for the fixed price components of the Service as stated in the agreement will be billed monthly in arrears.

**25.22** The charges for the variable amount of data stored will be billed monthly in arrears at the end of each calendar month. The amount charged will be calculated based on the amount of data protected by the system on the last day of the month.

**25.23** The unit price for each component of the Service may be reviewed on a monthly basis by Progress.

**25.24** You may not withhold payment for the Services by reason of any outstanding claim under this or any other Agreement with us.

**25.25** Any delay in payment will entitle Progress to suspend the Services.

**25.26** In respect of the Services, if Progress delays or fails to perform its obligations under the Agreement, the maximum liability is limited to the amount already paid by you under the Agreement for Services (excluding VAT or other tax and the cost of any equipment provided under the Agreement for Services and which shall be owned or controlled by you).

**25.27** Progress shall not be liable to you for any claims, loss or damage (including consequential loss or damage) of whatsoever nature and howsoever caused except as is provided by statute.

**25.28** Other than as required by law, no other conditions, warranties, terms, representations and undertakings apply to the Services if we are prevented from providing the Services for any reason beyond our reasonable control. In such circumstances Progress may suspend or delay delivery of the Services and shall not be held responsible or liable to you for inability to deliver them.

**25.29** Progress cannot guarantee the proper delivery of any email message or other data item once it has left the confines of the Data Storage centre, and similarly Progress cannot guarantee that data traffic will be delivered or that its contents will be held secure once it passes from the Data Storage Centre's control.

**25.30** The Customer warrants and undertakes that neither it nor any person authorised by it, will knowingly publish or transmit over the Internet nor store on the Online Backup system at the Data Storage Centre any material that is obscene, threatening, defamatory or likely to cause offence or which in any way infringes the intellectual property rights of another party. You hereby agree to indemnify and hold Progress harmless from any and all demands, losses, claims, proceedings, damages, costs and expenses including legal fees arising out of any claim against us in relation to such materials.

**25.31** The provision of Services shall be automatically renewed for a further twelve (12) months unless notice of termination in writing is given by either you or us not less than ninety (90) days prior to the end of any twelve (12) month period for each Agreement for Services that exists or within any renewal of 12 month period.

**25.32** In the event that a Customer identifies, or suspects, a bug or non-conformance in the Data Secure Agent of Online Backup Software support requests are to be sent via email to Progress at support@progresscomms.co.uk or by telephone 20 8347 6633.

**25.33** All Software Support calls relating to the Online Backup Service received by Progress will be logged as an Incident with NO CHARGE. Whenever possible Progress will resolve the issue and all details of the Software support provided will be recorded in the application.

**25.34** If it becomes apparent that the incident is related to any factor other than the Online Backup software itself, the Support provided will be deemed not to be Software Support and therefore chargeable as Incident Support in accordance with the standard Terms and Condition for the IT Support.

**25.35** If the Customer requires Incident Support in relation to the Service such as an alteration to the backup schedule or the retrieval of backup data, this will be chargeable and will be dealt with in accordance with the Terms and Conditions for the IT Support.

**25.36** In the event that the existence of a bug within the Backup Agent is confirmed, Progress will notify the third party provider as soon as is practically possible.

**25.37** Once informed by the third party provider Progress will inform the Customer as to the nature of the non-conformance, platforms affected, any actions which should be taken by the Customer, and estimated time for the third party provider to rectify the bug or non conformance.

**25.38** Progress cannot provide guarantees or take responsibility for the time taken by the third party provider to rectify the bug or non conformance.

**25.39** When the third party provider is required to resolve Software Support queries, the work shall be performed remotely via the Internet.

**25.40** The Customer is responsible for ensuring that use of the Products by itself and its Customers is in every respect lawful, and will indemnify Progress against any liability, costs, or loss which Progress may suffer arising from any breach of this obligation.

**25.41** Progress accepts liability to the Customer for direct loss and damage resulting from its negligence, or from any failure by it to perform this agreement, except where that results from causes beyond its reasonable control.

**25.42** Progress is not liable for any delays or failures on the part of third party suppliers and providers. Progress is not liable for economic, consequential or indirect loss or damage, or for loss of profit, business, revenue, goodwill or anticipated savings.

**25.43** Progress shall not in any event be liable for any claims not notified to it in writing within five days of the cause of action accruing.

**25.44** Progress does not exclude or limit liability for death or personal injury arising as a result of its negligence.

**25.45** Progress and the Customer both acknowledge that (a) neither party enters this Agreement on the basis of or in reliance on any representation, warranty or other provision except as expressly provided in writing, and (b) any liability or remedy for innocent or negligent misrepresentation is expressly excluded, and (c) save to the extent expressly provided herein, all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law.

**25.46** Save to the extent expressly permitted hereby, the Customer may not assign, deal with, sub-contract or dispose of any of its rights under or delegate the burden of this Agreement without the prior written consent of Progress.

**25.47** This Agreement and the applicable Product Terms and any separate agreement relating to confidentiality together contain all the terms which the parties have agreed in relation to the subject matter of this Agreement, and supersede any prior written or oral agreements, representations or understanding between the parties relating to such subject matter. Neither party to this Agreement has been induced to enter into it by a statement or promise which it or the Product Terms do not contain, save that this clause shall not exclude any liability which one party would otherwise have to the other party in respect of any statement made fraudulently by that party.

**25.48** Progress may vary these terms at any time by making the changed / varied terms accessible on its website. If Progress does so and if the Customer does not wish to accept the variation, the Customer may before the Variation Date; give notice to terminate, the Progress Contract by giving the required notice of termination.

**25.49** All termination notices under this agreement shall be in writing. Notice shall be deemed given where (a) sent by email and acknowledged by the recipient to have been received, or (b) sent by prepaid 'Recorded Signed For' mail.

**25.50** The formation, existence, construction, performance, validity and all aspects whatsoever of this Agreement or of any term of this Agreement shall be governed by English law. The English courts shall have non-exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement. The parties agree to submit to the jurisdiction.

**25.51** If the whole or any part of this Agreement is found by any Court, tribunal, administrative body or authority of competent jurisdiction to be wholly or partly illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from this Agreement and shall be ineffective without so far as possible, modifying any other provision or part of this Agreement and it shall not affect any other provisions of this Agreement which shall remain in full force and effect.

**25.52** The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it.

**25.53** Neither party to this Agreement shall be deemed to be in breach of this Agreement or otherwise liable to the other party in any manner whatsoever for any failure or delay in performing its obligations under this Agreement, if it is due to any event beyond the reasonable control of a party to this Agreement which shall include, without limitation, strikes, lockouts or other industrial disputes (whether involving the workforce of the party so prevented or any other party) 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, or storm or default of suppliers, third parties, or sub-contractors.

**25.54** After the Agreement Initial Term, this Agreement will automatically renew for additional one (1) year terms (each, a "Rollover Year Term") unless a party gives the other party written notice of non-renewal at least 90 days before

commencement of the next Renewal Term. The "Agreement Initial Term" and all "Renewal Terms" constitute the "Term" of this Agreement.

## **26.0 Mail Continuity / Mail Secure / Hosted Exchange Services / and other MS Office licenses**

**26.1** Definitions explained as below.

**26.2** 'New Email' means email sent from and received by your users at their normal email addresses, commencing with the time a Switchover is implemented.

**26.3** 'Old Email and Exchange Data' means your existing Microsoft Exchange database and the data therein, which may include old emails, contacts, calendars, tasks, and public folders.

**26.4** 'Company Data' means any of your data normally accessed by your users from their PCs, other than Old E-Mail and Exchange Data.

**26.5** 'Switchover' means the process by which your New Email begins to be received on and sent by our own mail server and can thereafter be accessed via the internet by your users thereon using their own PCs, following your request for implementation.

**26.6** 'Old Exchange Access' means the process by which we restore the most recent available backup of your Old Email and Exchange Data to our own MS Exchange server, for 'read only' access by your users via the internet using their own PCs, following your request for implementation.

**26.7** 'Global Company Data Access' means password protected access via the internet by your users using their own PCs to Company Data, at any time.

**26.8** 'Webmail' means the process of accessing your email via a webpage using your Internet browser.

**26.9** 'Bulk Email' means a group of more than five thousand (5,000) email messages with substantially similar content sent or received in a single operation or a series of related operations.

**26.10** 'Spam' means unsolicited commercial email.

**26.11** 'Confidential Information' means all trade secrets, business, technical and financial information, computer software, machine and operator instructions, business methods, procedures, know-how, and other information, irrespective of the form of communication, that relates to the business or technology of either party that is identified as being confidential at the time of disclosure or disclosed under circumstances that would lead a reasonable person to believe such information is confidential. Confidential is in general treated as such if it is expressly marked as confidential or which is manifestly confidential or which is confirmed in writing to be confidential within 7 days of its disclosure by the Customer.

**26.12** 'User' means a person, mailbox or machine that uses the Service.

**26.13** 'Hosted Services' are the Services provided by Progress and ordered by the Customer as detailed on the Customer Order Form.

**26.14** 'Initial Period' is the period of the Terms as set out in the Customer Order Form commencing on the Start date of the Services.

**26.15** 'Software' are all machine readable data and instructions, including middleware and firmware and related updates and upgrades, licenses materials, user documentation, user manuals and operating procedures used or in the provision of, or the for the Customer to access, the Services.

**26.16** 'the Servers' are the Server(s) used for the purpose of providing the Services.

**26.17** 'System' is the equipment [hardware, software etc.] belonging to or used by Progress or its third party partners and which provides a link to the World Wide Web via the Internet.

## **27.0 Supply of Mail & Hosted Services and Conditions of Use and other MS Office licenses**

**27.1** Progress shall supply the above Services in accordance with the provisions of these Terms.

**27.2** Progress shall, either on its own reasonable judgement, or on request by the Customer, promptly suspend availability of the Services over the Internet. Progress shall likewise, on its own reasonable judgement or on request by the Customer, promptly resume the provision of the Services following such suspension.

**27.3** Progress shall maintain reasonable safeguards against the destruction, loss or unauthorised alteration of the Customers Material, and shall maintain reasonable security procedures to restrict the destruction, corruption or unauthorised access to the Customer's Material, including back up material.

**27.4** Progress will implement and use appropriate virus-protection procedures and software on the Customers Material.

**27.5** Progress reserves the right both prior to the provisioning of the Service and at any time during the supply of the Service to test whether the Customer's Email systems allow Open Relay. If at any time the Customer's Email systems are found to allow Open Relay, Progress will inform the Customer, and Progress reserves the right to withhold or suspend all or any part of the Service immediately and until the situation has been resolved to Progress's satisfaction.

**27.6** If at any time Progress determines that the Customer's Email systems are being used for Bulk Email or Spam, Progress will inform the Customer, and Progress reserves the right to withhold or suspend all or part of the Service immediately and until such use is terminated.

**27.7** If at any time continued provision of the Service would compromise the security of the Service due, without limitation, to hacking attempts, denial of service attacks, mail bombs, or other malicious activities either directed at or originating from the Customer's domains, the Customer agrees that Progress may suspend Service to the Customer. In such an event, Progress will promptly inform the Customer and will work with the Customer to resolve such issues and reinstate Service at the earliest reasonable opportunity.

**27.8** Subject to applicable law, Progress may provide the Service from any hardware installation anywhere in the world and may, at any time, transfer the provision of the Service from one installation to another. Progress does not guarantee that any such installation, or any part thereof, is or will be dedicated to the sole use of the Customer.

**27.9** Progress may add, delete, or change the Service, including without limitation modifying specifications relating thereto, on reasonable notice to Customer. Progress may substitute products or services of later design to fill an order, provided the changes, modifications, or substitutions under normal and proper use do not adversely impact on form, fit, or function.

**27.10** Should the Service be suspended or terminated for any reason whatsoever, Progress reserves the right to reverse all configuration changes made upon provisioning the Service. In such event, the Customer acknowledges and agrees that it shall be responsible to undertake, at its sole cost and expense, all other necessary configuration changes to its Email servers and to inform its Internet Service Provider ("ISP") of the need to reroute inbound Email.

**27.11** Subject to applicable law, Progress and its partners may monitor Customer's use of the Service, and disclose or otherwise use information obtained in so doing) only to:

- A. comply with applicable law, regulation, or other governmental request or order;
- B. determine whether Customer's use of the Service violates applicable law;
- C. protect the integrity of the public Internet, the Service, and/or Progress's systems and/or networks; or
- D. take other actions agreed upon or requested by Customer.

**27.12** The Customer agrees to provide and maintain a list of specific Email addresses to receive the Service (the "Validation List"). It is the Customer's responsibility to verify such Validation List prior to the Service being made available and throughout the term of the Agreement. The Customer acknowledges that inbound email sent to email addresses not specified or incorrectly entered in the validation list will be blocked automatically. The Customer agrees that Progress can accept no liability due to the non-delivery of such email resulting from errors in or omissions of email addresses.

**27.13** The Customer acknowledges that the service will be provisioned with Progress's default settings applied from the outset as detailed in the relevant service descriptions and that it is the Customer's sole responsibility to configure the service to its own requirements.

**27.14** The Customer will be responsible for obtaining and maintaining their own compatible computer system being all such equipment, software and communications lines, including any public lines required by the Customer to access the Services ("Customer's Equipment"). Progress has no responsibility for or liability with respect to the Customer's Equipment.

**27.15** All Software made available for use by the Customer under these Terms is provided subject to the License Terms.

**27.16** The Customer shall use the Services in accordance with the Acceptable Use Policy of Progress and in particular (but without limitation) the Customer shall not:

A. Send any message, email or other communication which, under the laws of England and Wales or, where appropriate, under international laws, conventions, codes or regulations applicable to the Internet:

- 1) is in breach of those laws, codes or regulations including but not limited to infringement of copyright and other intellectual property rights ("IPRs"), defamation, theft, fraud, drug-trafficking, money- laundering and terrorism;
- 2) may incite violence, sadism, cruelty or racial hatred;
- 3) may facilitate prostitution or paedophilia;
- 4) is pornographic, obscene, indecent, abusive, offensive or menacing.

B. Knowingly create and/or introduce any malware, virus, worm, Trojan horse or other destructive or contaminating program or advise any other party how to do so;

C. Invade the privacy of other users of the Services or the Internet, for example by sending unsolicited emails known as "spamming" nor collect or transfer personal data on individuals without their consent;

**27.17** The Customer shall use an up-to-date virus-scanning program on all of their Material.

**27.18** The Customer shall maintain confidentiality of its login names, passwords and other confidential information relating to the access to the Service.

**27.19** The Customer acknowledges that Progress does not operate or exercise control over, and accepts no responsibility for the content of the Customers Materials received on their System.

## **28.0 Customer's Obligations of Mail & Hosted Services and other MS Office licenses**

**28.1** Customer shall maintain the confidentiality of any user ID and/or password that affects:

- a) Customer's access to or use of the Service;
- b) any computer system or network used in connection with the Service; or
- c) any software, application, or service used in connection with the Service.

All such user IDs and passwords shall be considered "Confidential Information" hereunder.

**28.2** The Customer recognizes that information sent to and from the Customer will pass through the Service and accordingly the Customer agrees to ensure to use the Service for legitimate and lawful business purposes only.

**28.3** Customer shall be responsible for any data or systems failure or corruption, or any other loss or damage, caused by Customer's (or Customer's employee's, agent's, or contractor's) release or distribution of Malware-infected files or content blocked, stopped, or otherwise remediated by the Services.

## **29.0 Professional Services On-Demand of Mail & Hosted Services and other MS Office licenses**

**29.1** Progress shall provide professional services as agreed between Progress and the Customer (either by written format or by email or fax or verbal instructions) in addition to and to compliment the Services.

**29.2** Progress shall perform the professional services in a professional manner and with due care and skill;

**29.3** Each party acknowledges that the scope and specification of the professional services may be subject to change subsequent to the commencement of the professional services. Variation to the Work instructions shall be agreed between Progress and the Customer and confirmed either in writing or verbally by both parties.

**29.4** Where Progress perform professional services at a Customer site or another third party site the Customer will pay Progress all travel and all out of pocket expenses on demand. For the avoidance of doubt travel costs will be charged at £0.55 pence per mile, all other travel and subsistence expenses will be recharged at cost.

## **30.0 Payments of Mail & Hosted Services and other MS Office licenses**

**30.1** The Customer shall pay to Progress the charges for the supply of the Services as set out in the Customer Order Form.

**30.2** The charges payable by the client should be paid immediately and in advance of the provision of any of the described services or in some cases with 14 days grace period from date of invoice, and under these Terms are exclusive of Value Added Tax which shall be paid by the Customer at the rate and in the manner for the time being prescribed by law.

**30.3** Progress may vary all or any charges by giving 30 days written notice to the Customer in advance of the expiry date of the Initial Period or any anniversary thereof, save for the passing through of any increased charges by a third party service provider or licensor in which case charges may be varied by giving 30 days-notice at any time.

**30.4** Where charges are not paid by the Customer when due, Progress upon 14 days from invoice date will notify the Customer, and all Services relating to the unpaid invoice will be disconnected. A reconnection fee will apply in such cases.

**30.5** The customer shall pay charges for professional services within 14 days of the performance of such services, or upon the completion or acceptance of such professional services, whichever is the earlier. Progress shall notify the customer in writing when it considers the professional services to have been performed/completed/accepted as appropriate.

**30.6** If you exceed your quota, you will be invoiced for the additional amount monthly in advance or arrears with payment due within 14 days of invoice. Progress is not obliged to provide service whilst any payment is overdue.

### **31.0 Terms and Termination of Mail & Hosted Services and other MS Office licenses**

**31.1** After the Agreement Initial Term (one calendar year or 12 months from the day of order), this Agreement will automatically renew for additional one (1) year terms (each, a "Rollover Year Term") unless a party gives the other party written notice of non-renewal at least 30 days before commencement of the next Renewal Term (unless otherwise agreed or stated on our monthly invoice). The "Agreement Initial Term" and all "Renewal Terms" constitute the "Term" of this Agreement.

**31.2** Without prejudice to any other rights to which it may be entitled, either party may terminate this Agreement with immediate effect upon written notice to the other party:

- a) if the other party commits any material breach of any of the terms herein and (if such a breach is remediable) fails to remedy that breach within fifteen (15) days of that party being notified thereof; or
- b) if (i) an order is made or a resolution is passed for the winding up of the other party; (ii) an order is made for the appointment of an administrator to manage the affairs, business, and property of the other party; (iii) a receiver, administrator, or administrative receiver is appointed of any of the other party's assets or undertaking; (iv) circumstances arise which entitle a court with proper jurisdiction or a creditor to appoint a receiver or manager or which entitle a court with proper jurisdiction to make a winding-up order; or (v) if the other party takes or suffers any similar or analogous action in consequence of debt.

**31.3** Progress, without prejudice to any other rights to which it may be entitled, may terminate this Agreement:

- a) without cause upon thirty (30) days written notice to Customer;
- b) upon written or email notice to Customer if Customer fails to pay any amount due and payable to Progress or Group companies and fails to remedy such breach within seven (7) days of being notified thereof; or
- c) upon written notice to customer if there is a Change of quote for the Customer.

### **32.0 Confidentiality of Mail & Hosted Services and other MS Office licenses**

**32.1** Each party ("Recipient") acknowledges that during the performance of this Agreement, it may have access to the other party's ("Discloser") Confidential Information. The Recipient agrees that such Confidential Information is proprietary to the Discloser and will remain the sole property of the Discloser.

**32.2** The Recipient agrees as follows: (i) to use the Confidential Information only for the purposes described in this Agreement; (ii) to hold in confidence and protect the Confidential Information from dissemination to, and use by, any third party, taking precautions at least as protective as those the Recipient employs with respect to its most confidential materials, but in no case less than reasonable precautions; (iii) restrict access to the Confidential Information to its employees and contractors who have a need to have access to the Confidential Information and who are bound by confidentiality obligations at least as restrictive as those set forth in this Agreement; (iv) immediately notify the Discloser upon discovery of any loss or unauthorized disclosure of the Discloser's Confidential Information; and (v) to return or destroy all Confidential Information upon termination of this Agreement.

**32.3** The foregoing provisions will not apply to Confidential Information that: (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the Recipient; (iii) is rightfully communicated to the Recipient by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the Recipient's possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the Recipient without access to the Confidential Information; or (vi) is approved for release or disclosure by the Discloser in writing without restriction. Notwithstanding the foregoing, the Recipient will be allowed to disclose Confidential Information of the Discloser to the extent that such disclosure is required by law or by the order of a court or similar judicial or administrative body; provided that, the Recipient notifies the Discloser of such required disclosure promptly in writing and cooperates with the Discloser, at the disclosing party's request and expense, in any lawful action to contest or limit the scope of such required disclosure.

**32.4** Progress recognizes and confirms that the content of all Emails sent to or received from the Customer by the Service is confidential. In the normal provision of the Service Progress will not access, read or copy Emails or their attachments other than by electronic methods for the purposes of providing the Service. However, Progress and its partners or third parties reserves the right to utilize the Virus-related content of such Email or its attachments solely to:

- a) maintain and improve the performance and the integrity of the Service;
- b) comply with all regulatory, legislative or contractual requirements; and
- c) make available to Service subscribers any information passing through the Service which may be of interest to them, solely for the purpose of further developing and enhancing the Service, provided that information provided by Progress does not include any Customer- identifiable information.

### **33.0 Data Privacy and Regulation of Investigatory Powers of Mail & Hosted Services and other MS Office licenses**

**33.1** The Customer hereby notifies Progress that their Material contains personal data as defined in Section 1(1) of the Data Protection Act 1998 (the Customers Personal Data) and warrants to Progress that the Customer has notified under the said Act in respect of their Customers Personal Data.

**33.2** The Customer warrants to Progress and undertakes that:

- a) their Personal Data has been obtained and processed (in so far as the Customers Personal Data has been processed) lawfully;

- b) the Services will be entirely consistent with and appropriate to the specified and lawful purposes for which the Customer has notified under the said Act in respect of the Customers Personal Data
- c) that they will not during the continuance of these Terms use or disclose their Customers Personal Data or any part thereof in a manner incompatible with the Notified Purposes; and
- d) their Personal Data is accurate and Progress shall keep the Customers Personal Data fully up to date at all times during the continuance of these Terms.

**33.3** Customer acknowledges that information processed in the course of performing the Services may contain personally identifiable information of individuals and associated metadata and that the processing of such information may therefore involve the processing of personal data. With respect to any and all data, including, but not limited to, third party data, personally identifiable information and associated metadata obtained by Progress or its partners pursuant to Customer's use of the Services (collectively, the "Data"). Customer shall take all necessary measures to ensure that it, and all its employees, are aware of any responsibilities they have in respect of applicable privacy laws and/or regulations. Customer understands and agrees that Progress or its partners and suppliers has no control or influence over the content of the Data processed by Progress or partners or its suppliers and that Progress and its suppliers perform the Services on behalf of the Customer.

**33.4** In addition to any indemnity given by the Customer elsewhere in this Agreement, the Customer shall indemnify Progress against any loss or damage which Progress may sustain or incur as a result of any breach by the Customer of the provisions of this Clause. In performing its Services Progress may process (albeit for diagnostic or investigative purposes only) personal data belonging to the Customer. Progress hereby warrants to the Customer that in such circumstances it will in respect of such personal data observe all the obligations pertaining to a data processor under the Data Protection Act 1998 and will indemnify the Customer against all breaches of the said Act by Progress in respect of the Customers data.

#### **34.0 Hosted Mail Exchange and other MS Office licenses**

**34.1** Progress shall provide access for all users to historic and new email via our Hosted Exchange service 24/7 with mailbox limits of 50GB per user, (as the maximum higher limit agreed). As standard, PST files will not be imported. If your existing mailboxes are larger than the agreed limit, you will need to arrange to export historic email to PST files to store on your network. It is your responsibility to ensure these PST files are backed up as we will not retain a copy. Public folders can be stored but will count towards your overall mailbox limit.

**34.2** In the event of a failure, users will be able to access a Webmail version of their Exchange data. All email will be automatically scanned for viruses and spam using Progress's Email Protection service.

**34.3** Progress shall institute procedures by which so far as reasonably practicable, securely encrypted copies of your Hosted Exchange email will be taken automatically at intervals throughout the day and night, and transmitted to and stored on our servers in purpose built data centres, so as to enable access thereto by you in case of need.

**34.4** It is the Customer's responsibility to maintain their own Internet Progression of adequate capacity to enable you to access email via our Hosted Exchange service. We can advise you on how to overcome this issue, should it become a problem for you.

**34.5** Whilst reasonable efforts will be made to ensure that a current backup is maintained of all relevant Hosted Exchange email, Progress cannot guarantee that all such data files will be 100% up to date at all times. Our obligations are limited to using reasonable efforts to maintain an adequate recent backup, and to providing prompt access to such backup data is as in fact available.

**34.6** Access to Hosted Exchange email can be obtained by Customer's users using their own PC terminals and Internet Progressions. It is the Customer's users' own responsibility to provide and maintain a sufficiently fast and reliable Internet Progression; support in relation to that progression is not included under this agreement.

**34.7** Such access as mentioned under 29.9.6 is obtained by user password; it is the Customer's responsibility to keep any passwords issued to the Customer for your users secure, and to advise Progress immediately if you have reason to suspect a password to have become compromised. All access using a password allocated to you is conclusively presumed to have been authorised by you.

**34.8** So far as is reasonably practicable, backups will continue to be taken and Global Company Data Access will be available on a 24 hour - 7 day basis; it is however technically impossible to provide fault-free service, and the service is provided 'as is' and without warranties of any kind, express or implied (other than warranties not capable of exclusion). Whilst Progress shall use reasonable efforts to ensure that the Service is maintained at all times, to keep unavoidable interruptions to a minimum, and to give notice of anticipated interruptions, it is inevitable that there may be times when the service or some aspects of it are not available.

**34.9** Online backup is not insurance against data loss, and nor is it a substitute for such insurance. Online backup is a Service intended to help the Customer to take reasonable precautions to prevent data loss, at reasonable cost, and to gain access to backed up data so as to enable 'business as usual' as quickly as possible, in case of need.

#### **35.0 Supply & Provision of FTTC & ADSL Internet Service**

##### **35.1 General definitions**

35.1.1 "Acceptable Use Policies" means the policies set out on the Company's Web Site relating to the use of the Services, as modified or amended from time to time and "Acceptable Use Policy" shall be construed accordingly;

35.1.2 "Account" means the Customer's account with the Company for provision of the Services;

35.1.3 "Agreement" means these General Terms and Conditions of Supply, the Customer Application, the Acceptable Use Policies, the Price List, the Privacy Policy and the Specific Terms and Conditions, all of which, taken together, constitute the agreement between the Company and the Customer for the supply of the Equipment and/or Services;

35.1.4 "Business User" means a Customer who uses the Services and/or Equipment in the course of any trade or business;

35.1.5 "Charges" means the charges payable by the Customer in return for the Services and/or Equipment in accordance with Clause 30.8;

35.1.6 "Company" means Progress IT London Ltd (Company Registration Number 3111759) of registered office at 21 Aylmer Parade, Aylmer Road, London, N2 0AT, and trading address Offices 104 & 139, Building 3, North London Business Park, Oakleigh Road South, London, N11 1GN;

35.1.7 "Company's Web site" means the Web site at <http://www.progressit.london>, and references to "our Web site" shall be construed accordingly.

35.1.8 "Customer" means the person, group of persons or other entity whose name and address is or are set out in the Customer



Application;

35.1.9 "Customer Application" means the application form for the supply by the Company of the Equipment and/or Services, completed by, or in accordance with an order from, the Customer;

35.1.10 "Direct Customer" means a person or entity billed by Progress

35.1.11 "End User" means the person or entity receiving the benefit of the service. End User and Customer are interchangeable terms when the customer is a Direct Customer.

35.1.12 "Equipment" means the equipment specified on the Customer Application;

35.1.13 "Insolvency" means in relation to the Customer any of the following (as relevant): the appointment of any nominee, trustee, supervisor, administrator, administrative receiver, receiver or liquidator pursuant to the Insolvency Act 1986 (as modified, amended or replaced from time to time); or the entry into any compromise or arrangement with its creditors or, being a consumer, commits any act of bankruptcy, becomes bankrupt or enters into an individual voluntary arrangement; or if an order is made or effective resolution is passed for its winding up (except for the purposes of amalgamation or reconstruction of a solvent company); or the occurrence or suffrance of anything equivalent under any jurisdiction other than England or Wales and "Insolvent" shall be construed accordingly;

35.1.14 "Intellectual Property" means all intellectual property of any kind whatsoever including without limitation patents, trademarks, trade names, service marks, copyright, moral rights, rights in design, rights in databases, know-how, confidential information and any other intellectual or industrial property whether or not registered or capable of registration (and including applications for any such right) together with all or any goodwill relating to such intellectual property;

35.1.15 "Law" means the law of England and Wales, in force from time to time, and shall include (without prejudice to generality of the foregoing) all criminal law, laws relating to Intellectual Property and all laws, rules and/or regulations relating to the publication or transmission of information or data in electronic form. References to "Law" shall be construed accordingly;

35.1.16 "Location" means the point of delivery of service

35.1.17 "Minimum Cancellation Notice Period" means the minimum period of notice that a Customer must give the Company to terminate a specific Service or this Agreement, as set out in Clause 30.11.8 of the General Terms and Conditions of Supply or as set out in the Specific Terms and Conditions;

35.1.18 "Minimum Service Period" means the minimum Service Period as set out in Clauses 35.3.2 and 30.3.3 or the Specific Terms and Conditions;

35.1.19 "Name" means any name specifically requested by or allocated to the Customer for the provision of the Services and includes any User Name, Internet domain name or electronic mailbox name;

35.1.20 "Network Connection" means an Internet access service for use by multiple machines;

35.1.21 "Password" means a password issued to the Customer for the Customer's access to the Services;

35.1.22 "Price List" means the Company's price list relating to the Equipment and/or Services set out on its Web site, as amended from time to time;

35.1.23 "Privacy Policy" means the Company's policy regarding privacy, set out on our Web site, as amended from time to time;

35.1.24 "Service Period" means the period of an individual Service provided in accordance with this Agreement;

35.1.25 "Service" means a service provided by the Company to enable the Customer to gain access to the Internet (and other services and facilities provided by the Company in connection with that service as described at <http://www.progresscomms.co.uk>), as are specified on the Customer Application, and described in the Company's literature at the date of completion of the Customer Application together with all services and/or facilities referred to in any Specific Terms and Conditions; All references to "Services" shall be construed accordingly;

35.1.26 "Specific Terms and Conditions" means the Company's specific terms and conditions (if any) applicable to any part of the Services referred to on the Customer Application;

35.1.27 "us" or "we" means the Company, and references to "our" shall be construed accordingly;

35.1.28 "User Name" means any user name allocated to the Customer for access to the Services;

35.1.29 "you" means the Customer, and references to "your" shall be construed accordingly.

## **35.2 Services**

35.2.1 We shall provide you with the Services and/or the Equipment subject to the terms of this Agreement.

35.2.2 You can place your order for Equipment and/or Services by;

- a) completing our online order application form at <http://www.progresscomms.co.uk>
- b) sending us a completed order application form by post or by fax to the address or
- c) fax number set out on our Web site; or
- d) telephoning our sales team on the number set out on our Web site.
- e) submitting an order using email.

Please note it is your responsibility to check that your order is correct before submitting it. Should you encounter any problems with your order, or if you have made a mistake with your order, please contact us on 020 3358 0070

35.2.3 We shall not be obliged to provide the Services and/or Equipment to you unless and until:

(a) we have sent written notice to you (either by post, fax or e-mail) of our acceptance of the Customer Application; and

(b) we have received any initial Charges due from you in respect of the Services and/or Equipment. Subject to your right to cancel (if you are a consumer) as set out below, acceptance of the Services and/or Equipment by you constitutes your automatic acceptance of the terms and conditions of this Agreement; and

35.2.4 We will provide you with transit and routing services for e-mail and general Internet access. We will (in consideration of the Charges) deliver IP packets to the Customer network boundary only and will not be, or be held responsible for, the transit, routing and delivery of IP packets to individual workstations on the Customer network.

35.2.5 We will endeavour to ensure that the Services are of a high quality. In order to maintain the quality and safety of the Services, and any other services which we provide to our customers, we may from time to time:

a) suspend, close down or restrict the whole or any part of the Services in order to carry out emergency or other repairs, maintenance and/or improvements or to prevent overload of the network or to preserve the safety, security or integrity of the Services and any Internet traffic conveyed (although we will give you as much notice as is reasonably practicable before doing so and will endeavour to carry out such works during the relevant scheduled maintenance periods as published by us); and/or

b) give you instructions on how to use the Services. You agree to comply with any reasonable instructions we may give you in accordance with this Clause.

35.2.6 We will notify you as soon as possible if either we or our agents, employees, representatives or anyone else involved in providing the Services and/or the Equipment, require access to your premises, to install the Services and/or the Equipment or to carry out repairs, maintenance or upgrades. Where such notice is received by you, you agree to grant us and/or such other persons referred to, access to your premises. We will meet your reasonable requirements, and you agree to meet ours,

concerning the safety of people on your premises.

35.2.7 We may make software available to you that enables you to use the Services. This software must not be copied or modified by you or anyone else unless allowed by Law. You undertake and agree that you will access the Services only via use of this software, or in an alternative way permitted by us, and you will not attempt to circumvent any security measures inherent in the Services. Where such software is owned by or licensed to us, we will, where possible, grant you a revocable, non-transferable, non-assignable, non-exclusive license to use it for the duration of the Agreement (or, if shorter the duration of any licence of the software to us). Where use of such software by you requires you to enter a separate licence you agree to do so.

35.2.8 If you are a consumer (i.e. you are not purchasing either wholly or in part for your business or you are not a business) you have the right, in addition to your other rights, to cancel the Agreement (other than for personalised or perishable products, video, audio or software products which have been unsealed by you, or other products which we have specified as non-returnable) and receive a refund from us. You must inform us in writing if you wish to cancel within seven working days, starting on the day after the contract between you and the Company is concluded.

Details of your right to cancel will also be provided in the order acknowledgement email. The steps you need to take in order to conclude the Agreement are completing the online order confirmation and making payment of the initial fee.

If you choose to cancel then you must return any Equipment to us at your cost and risk and we advise you to ensure the Equipment is adequately insured during the return journey. You must ensure that you take reasonable care of the Equipment.

If you have not returned the Equipment within 14 days of cancellation or when requested by us to do so, whichever occurs first, we can collect the Equipment from you at your cost.

35.2.9 We will file a copy of the concluded Agreement. It will be accessible on request from Progress. If you are a consumer, we will acknowledge receipt of your order to the email address you have provided us with.

### **35.3 Service Period**

35.3.1 We will activate the Services, as soon as possible following completion of the matters referred to in Clause 30.2.3 above.

35.3.2 Subject to Clause 30.3.3 or where otherwise specified in the Specific Terms and Conditions, and except where terminated or suspended in accordance with this Agreement, the Services will be provided for a Minimum Service Period of 30 days from the date of activation.

35.3.3 Subject to your right to cancel, if you are a consumer, as set out above unless otherwise terminated or suspended in accordance with this Agreement or amended in the contract of supply, the following Services shall be provided for a Minimum Service Period of 12 months (or above if stated on the order application form / online order application form) from the date of activation:

- (a) Domain name registration/transfer and hosting;
- (b) Leased Lines, including Ethernet in the First Mile services;
- (c) Fibre To The Cabinet (FTTC) and Fibre To The Premises (FTTP);
- (d) ADSL broadband product;

35.3.4 On expiry of the periods referred to at Clauses 30.3.2 or 30.3.3 above (as appropriate) the Services will, unless terminated on or before the date of such expiry, automatically renew until terminated pursuant to this Agreement.

### **35.4 Changes**

35.4.1 We aim to provide the Services for the relevant Service Period. However, we may have to modify, suspend, vary or discontinue the whole or any part of the Services (including, without limitation, any codes or access details or technical specifications associated with the Services) and will endeavour to give you as much notice as is reasonably practicable if we need to do so.

35.4.2 We may have to change the terms and conditions of the Agreement. Where this is necessary we will notify you in advance before the changes to the terms and conditions take effect, and publish details of all changes on <http://www.progresscomms.co.uk> before they take effect. We may also communicate these changes at the same time via the email address stored on record for your connection. You are responsible for observing those changes periodically and also for the maintenance of a correct and functioning email address of contact with us.

### **35.5 Conditions of Use**

35.5.1 You agree that you will promptly provide us with all information that we may reasonably require in order to provide the Services and perform all of our other obligations under this agreement.

35.5.2 You agree that you will be responsible for all use of the Services and (unless, we have agreed to supply it as part of the Equipment) for providing a computer, modem, and all additional equipment and/or services (including, without limitation, a telephone line, if required), and for obtaining any permits and/or licences which are necessary for connecting to, and accessing, the Services. You agree that you are responsible for complying with all terms and conditions (including, without limitation, terms of payment) relating to any telecommunications service which is required by you to access the Services.

35.5.3 You are responsible for ensuring that the Services and/or Equipment are used in accordance with the Agreement. If you breach the Agreement we may, in our sole discretion, either:

- (a) suspend or terminate this Agreement and/or any of the Services in whole or in part, for any period which we shall determine without notice or refund;
- (b) make a reasonable additional charge to cover our costs incurred; or
- (c) block access to any part of the Services.

35.5.4 If, while using the Services, you discover that another person is using the Services, and failing to do so in accordance with the Agreement, you must inform us immediately.

35.5.5 You agree that you will, at all times and for whatever purpose, use the Services and/or the Equipment in compliance with all Laws.

35.5.6 In addition to Clause 30.5.5, you agree that you will not use, and will take all necessary precautions to ensure that nobody else uses, the Services and/or the Equipment:

- (a) fraudulently or in connection with any criminal offence;
- (b) to send, knowingly receive, upload, download, or use any material which is offensive, abusive, indecent, defamatory, obscene or menacing, or in breach of copyright, confidence, privacy or any other rights;
- (c) to cause annoyance, inconvenience or anxiety;
- (d) to "spam" or to send or provide unsolicited advertising or promotional material or, knowingly to receive responses to any spam, unsolicited advertising or promotional material sent or provided by any third party;
- (e) in any way which, in our reasonable opinion, is or is likely to be detrimental to the provision of services to you or any of our customers, or to our business and/or reputation;
- (f) in contravention of any licences or third party rights, or in contravention of our Acceptable Use Policies; or
- (g) in a way that does not comply with any instructions provided to you.

35.5.7 You may use the Services to link to other networks world-wide, provided that you comply, at all times, with any policies

and/or terms and conditions imposed by the operators of such other networks.

35.5.8 You agree that you will not perform or allow anyone else to perform any unauthorised IP or Port multicasting, spoofing, broadcasting, vectoring, filtering translation or routing.

35.5.9 You agree to:

- (a) keep any records of your User Name(s) and/or Password(s) in separate places and take all necessary steps to ensure their security; and
- (b) keep your User Name(s) and/or Password(s) private and confidential and ensure, at all times, that it (or they) do not become known to anyone else.

35.5.10 You agree that you will notify us immediately if you become aware of any change in circumstances which may lead you to believe that your User Name(s) and/or Password(s) have become known to anyone else.

35.5.11 You agree that we may, from time to time, and, where possible, on giving you reasonable notice, suspend and/or change your User Name(s) and/or Password(s). You also agree that you will not change or attempt to change your User Name at any time.

35.5.12 Any managed hardware, and/or routers, which you purchase from us, will be tested by us and configured to meet your basic network and Internet specifications. We cannot support any alterations to the configuration of such Equipment and any such alterations will invalidate our support obligation (if any) relating to such Equipment.

35.5.13 Title to any Equipment, which we have agreed to sell to you, will remain with us unless and until you have paid all sums due to us in respect of such Equipment.

35.5.14 Any fault with the Services and/or the Equipment, which you detect must be reported to us as soon as possible either:-

- (a) by telephone on 020 3358 0070
- (b) by e-mail sent to us at: support@progresscomms.co.uk
- (c) online via <http://www.progresscomms.co.uk>; or
- (d) to such other telephone number or email address or at such other Web site as we may notify to you from time to time for this purpose.

35.5.15 You agree that we may, at any time, scan any IP addresses allocated to you for anything which may affect the security of the Services (including open relays and/or open proxies or equivalent).

35.5.16 If, as part of the Services, you are provided with Web space to enable you to upload your own Web sites:

- (a) You are responsible for (and will hold us harmless against) any and all costs, claims, losses, expenses, damages, awards, proceedings, demands and other liabilities (howsoever arising) in connection with any material that either you or anyone else puts on your Web site(s); and
- (b) Your contact details must be clearly visible on your Web site(s) and updated as soon as possible after any change

35.5.17 Where we rent/hire equipment to you it will be our property at all times. You are responsible for making sure that our equipment is safe and used properly at all times, and agree to follow the manufacturer's instructions and any other instructions we give to you.

You agree that you are responsible for any loss, theft or damage to the equipment regardless of how it happens, and for arranging appropriate insurance to cover against this. Within 14 calendar days of service termination, the equipment must be returned in good working condition to our office at your cost and risk. If you fail to do so, we reserve the right to charge you for replacement of the equipment at the market rate current at the time of return. Payment for such charges must be received within 14 working days.

### 35.6 Names

35.6.1 In the event that we provide you with domain name services, the following provisions will apply:

- (a) You confirm that you are the owner of, and/or that you have full rights to use, any trade (or other) name or mark, or any Name, requested by or allocated to you;
- (b) We cannot guarantee that any Name requested by you will be available or approved for use;
- (c) If we have reasonable grounds to believe that the use by you of any Name is or would be in breach of Clause 6.1(a) above, we may refuse to allocate or cease to provide you with the name, and ask you to choose a replacement; and
- (d) Internet domain names are registered and/or provided to you in accordance with all terms and conditions issued by the regulatory body responsible for the maintenance of such domain names including, but not limited to, Nominet, Network Solutions and OpenSRS, copies of whose terms and conditions are available at:
  1. <http://www.nominet.org.uk/nominet-terms> and
  2. [http://www.networksolutions.com/en\\_US/legal/static-service-agreement.jhtml](http://www.networksolutions.com/en_US/legal/static-service-agreement.jhtml)
  3. [http://www.opensrs.com/docs/contracts/Services\\_Agreement\\_4.3.pdf](http://www.opensrs.com/docs/contracts/Services_Agreement_4.3.pdf)

or such other Web sites as may replace the above Web sites from time to time.

35.6.2 You agree that all static IP addresses are allocated to you on a rental only basis and will remain our property at all times.

### 35.7 Intellectual Property Rights

35.7.1 If, in our opinion, the display of any material or information, provided by you, is or would be in breach of any rights (including Intellectual Property rights) in that material or information, we may refuse or terminate such display.

35.7.2 You agree that, all copying, redistribution or publication of any material or

information subject to any rights (including Intellectual Property rights) of a third party will be carried out by you (or on your behalf) in accordance with all relevant laws.

35.7.3 You agree that you will not: use the corporate marks of us or our suppliers or name or any element thereof either alone or in combination with another word or device mark, nor any other brand, get up or trade mark of us or our suppliers, where such use constitutes or would constitute an infringement of our registered trade mark or common law trade mark rights of; or use or register or attempt to register as a trade mark, company name or domain name, anything that is identical to, similar to, or likely to be suppliers' corporate marks.

35.7.4 However, nothing in clause 35.7.3 prohibits you from making legitimate use of our name or any trade mark of ours whether in the form of factual statements or in accordance with Section 10(6) of the Trade Marks Act 1994, or in any other way which does not constitute an infringement of our registered or common law trade mark rights.

### 35.8 Charges

35.8.1 Except as otherwise provided in the Agreement, all Charges and other sums due from you in respect of the Services and/or Equipment shall be set out in the Price List and/or the Customer Application and/or the quotation or invoice relating to such Equipment and/or Services.

35.8.2 You shall pay the Charges (in advance and without any set off or deduction of any kind) on either a monthly, quarterly or

annual basis as stated in the Customer Application and/or the Price List and/or the invoice referred to in Clause 30.8.1 above. Where payment is not made in accordance with these terms, the Customer shall pay interest on any unpaid amounts calculated at 6% above Santander Bank's base rate for the time being in force calculated on a daily basis.

35.8.3 All amounts payable by you in accordance with the Agreement shall be exclusive of Value Added Tax ("VAT"), or any other applicable tax or duty, which shall be payable in addition to all such amounts due from you.

35.8.4 Where you are a Business User, we will send you a VAT invoice following completion of the provision of the Services. Where you are not a Business User, a payment receipt will be sent to you upon your written request.

35.8.5 You agree that you will notify us as soon as possible of any change in your payment method or bank account details. Should you terminate the Services in accordance with this Agreement, it is your responsibility to terminate any standing order with your bank.

35.8.6 If you use the Services and/or Equipment otherwise than in the course of a business, trade, profession or occupation, we may increase the amount payable by you for Services and/or Equipment by giving you one month's notice in writing. If you are a consumer, and this change is to your significant disadvantage, you may, within fourteen days of receipt of such notice, cancel this Agreement by notice to us in writing in accordance with the Minimum Cancellation Period. If you are a Business User, we may increase the amount payable by you for any Services and/or Equipment by giving you 14 days-notice in writing.

### 35.9 Liability

35.9.1 You agree that, in view of their nature, your use of the Services is at your sole risk. Whilst we will endeavour to ensure that the Services are of a high quality, neither we nor any of our agents, contractors, licensees, employees or information providers involved in providing the Services, give any guarantee that the Services will be uninterrupted or free from error. Where necessary for commercial, technical or other reasons:

(a) a network or service provider connected to the Services may suspend or terminate its connection to the Services; and

(b) the Services may suspend or terminate their connection to another network or service provider.

35.9.2 Although we will try to ensure the accuracy and quality of the Services, the Services are provided on an "as is basis" and:

(a) we do not accept responsibility for any use of or reliance on the Services or for any disruptions to or delay in the Services; and

(b) we do not make any representations as to the accuracy, comprehensiveness, completeness, quality, currency, error-free nature, compatibility, security or fitness for purpose of the Services.

Changes are periodically added to the information herein. No warranty, term or condition, express or implied, is offered by Progress IT London Ltd and our third party suppliers in relation to the Services, except as expressly provided in this Agreement. You also agree that any such suspension or termination referred to in Clause 30.9.1 above will not constitute a breach by us of the same Agreement.

35.9.3 You further agree that we will not be held liable for any costs, expenses, losses, damages or other liabilities (howsoever arising) which you may incur as a result of a suspension of the Services in accordance with Clause 30.2.5(a) above.

35.9.4 You acknowledge that the Internet is separate from the Services and that use of the Internet is at your own risk and subject to any applicable Laws. We have no responsibility for any goods, services, information, software, or other materials which you may obtain from a third party when using the Internet.

35.9.5 You also acknowledge that we may exercise editorial control over the content of our servers, but that we do not have the resources to ensure, nor are we capable of checking, the full content of our servers at all times. Neither we, nor any of our agents, contractors, licensees, employees and information providers, involved in providing the Services, are able to control the content of the Internet. You, therefore, agree that we shall not be held responsible for the publication, transmission or reception of any defamatory material or information of any kind, other than information which is inserted by us. You specifically acknowledge that we have given no warranties as to the quality, content or accuracy of information received through, or as a result of the use of, the Services.

35.9.6 You agree and acknowledge:

(a) that you are in a better position than us to foresee and evaluate any potential damage or loss which you may suffer in connection with the Equipment and/or the Services and/or any other service provided to you under the Agreement;

(b) that we cannot adequately insure our potential liability to you; and

(c) that the sums payable by you under the Agreement have been calculated on the basis that we shall exclude liability in accordance with the Agreement.

35.9.7 In no circumstances whatsoever will we be liable to you (whether in contract, for breach of duty, negligence or otherwise) for

(a) where you are a business:

- (i) loss of revenue;
- (ii) loss of actual or anticipated profits (including loss of profits on contracts);
- (iii) loss of the use of money;
- (iv) loss of anticipated savings;
- (v) loss of business;
- (vi) loss of opportunity;
- (vii) loss of goodwill;
- (viii) loss of reputation;
- (ix) loss or corruption of, or damage to, data, systems or programs; or
- (x) any indirect or consequential loss or damage howsoever caused,

which arises out of or in connection with any use of, or inability to use, the Services and/or the Equipment;

or

(b) where you are a consumer:

- (i) loss of revenue;
- (ii) loss of actual or anticipated profits;
- (iii) loss of the use of money;
- (iv) loss of anticipated savings;

loss or corruption of, or damage to, data, systems or programs; or

any indirect or consequential loss or damage howsoever caused, which arises out of or in connection with any use of, or inability to use, the Services and/or the Equipment

35.9.8 In any event:

- (a) Our liability to you for any failure of the Services or other event in any Minimum Cancellation Notice Period shall not exceed the Charges payable in respect of such Minimum Cancellation Notice Period.
- (b) Our aggregate liability to you of any sort (including for breach of contract and negligence) in connection with this Agreement shall not exceed the amount of Charges paid by you to us in accordance with this Agreement.

35.9.9 Nothing in this Agreement will limit our liability under Part I of the Consumer Protection Act 1987 or for death or personal injury caused by our negligence, or:

- (a) where you are a business:
  - (i) for liability under any breach of the obligations implied by s.12 Sale of Goods Act 1979 or s.2 Supply of Goods and Services Act 1982;
  - (ii) for fraud or fraudulent misrepresentation; or
  - (iii) any other liability which cannot be excluded or limited by applicable law; or
- (b) where you are a consumer:
  - (i) for liability under any breach of the obligations implied by s.12, s.13, s.14, or s.15 Sale of Goods Act 1979 or s.2 or s.13 Supply of Goods and Services Act 1982;
  - (ii) for fraud or fraudulent misrepresentation; or
  - (iii) any other liability which cannot be excluded or limited by applicable law, and any statutory rights you may have as a consumer remain unaffected.

### 35.10 Your Responsibility

35.10.1 You agree that you will be responsible for and hold us and our agents, contractors, licensees, employees and information providers, involved in providing the Services and/or Equipment, harmless from and against any and all losses, claims, damages, costs, demands, expenses and other liabilities which we suffer as a result of any breach by you of the terms of this Agreement, and from and against any claim brought by a third party alleging that the unauthorised use by you or modification by you of the Services and/or the Equipment, by you or under your Account, has infringed any intellectual property or other right of any kind, or any applicable legislation or regulation (whether international or domestic) but excluding any liability which we face as a result of criminal prosecution.

35.10.2 You agree to pay all costs, damages, awards, fees (including legal fees), judgements and other sums awarded against, or agreed to be paid by, us in relation to such claims referred to in Clause 35.10.1 above. You further agree that you will, as soon as possible, notify us of, and forward to us all correspondence received by you in relation to, such claims.

35.10.3 You also agree that we shall have full authority to defend, compromise or settle such claims referred to within Clause 35.10.2 above, and that you will, at your expense, provide us with all reasonable assistance necessary to defend such claims.

35.10.4 You agree that you are entirely responsible for any form of automated dialling system which you have set up (including, but not limited to, the reliability of such system and any call costs which may be incurred as a result of its use).

35.10.5 You agree that the configuration of your internal network remains your responsibility. Any interruption to the Services resulting from such configuration shall not be regarded as an interruption in or suspension of the provision by us of the Services.

35.10.6 You agree that any Equipment connected to or used with the Services will bear the European Consumer Equipment Standards "CE" mark. You will be responsible for ensuring that all such Equipment is technically compatible with the Services and is used in compliance with all relevant instructions and safety and security procedures.

### 35.11 Suspension and Termination

35.11.1 You agree that we may suspend or terminate the Services and/or your Account and/or terminate the Agreement at any time, without prior notice or refund to you, and without affecting any of our accrued rights or claims, either:

- a. where we reasonably believe that the Services are being used in breach of Clauses 35.5.5 or 35.5.6 or 35.5.8;
- b. for non-payment (when due) of the Charges or any other sum due from you under the Agreement or any other agreement with us;
- c. for any other material breach of the Agreement by you;
- d. where you have breached the Agreement in any other way on three or more occasions (and we have given you notice of the first two breaches);
- e. where you are or you become Insolvent or suffer any distress or execution or other legal process to be levied or enforced or sued upon or against any part of your property, assets or revenue and which is not discharged or stayed within 7 days, or you cease or threaten to cease to carry on business; or
- f. where, at any time, an agreed method of payment is unavailable for collection under this agreement.

You also agree that where this Agreement or your Account is terminated for your breach, the Services will automatically terminate.

35.11.2 If your communications network does not conform to the standards set out in Clause 35.5.6, to either our or any of our other customers' detriment we may, without prejudice to our other rights under Clauses 35.5.3 and 35.11.1, suspend your access to the Services until you have given a suitable undertaking as to use.

35.11.3 You acknowledge and agree that our resources, used in providing the Services, are limited and that any reckless or wasteful use of the Services by you may affect those resources and the services provided to our other customers. You agree that we may suspend or terminate your access to the Services where we decide, acting reasonably, that you are using the Services in a reckless or wasteful manner. You further agree that we may terminate your access to the Services where we decide, acting reasonably, that you are continuing to use the Services in a reckless or wasteful manner after having first been suspended and then reinstated.

35.11.4 You agree that, notwithstanding the provisions of Clauses 35.3 and 35.11.1 (but without affecting our other rights to terminate under this Agreement), we may terminate all or any of the Services at any time, on 14 days-notice. Any refund that is due to you, will be made by us following the cancellation of the Service(s), and will be made direct to your bank account (notified to us for this purpose) by BACS transfer. Should you fail to provide suitable bank details to allow a refund to be made, you will lose the right to such refund, unless you are a consumer, in which case we will send you a cheque to the address stated on the Customer Application.

35.11.5 Any suspension of the Services by us in accordance with this Agreement will not constitute a termination of the Agreement and we may (where we have suspended the Services due to your breach of this Agreement) require you to pay a reconnection fee to recommence the Services together with the relevant Charges.

35.11.6 You may terminate all or any of the Services, at any time after the Minimum Service Period, subject to the Minimum Cancellation Notice Period. Should you wish to terminate a Service in accordance with this Clause, you must, give written notice

to us in accordance with Clause 35.16.7 Where you terminate within the Minimum Service Period you will

- a) if you are a business, be liable to pay the Charges due in respect of that Minimum Service Period; and
- b) if you are a consumer, be liable to pay the Charges due in respect of that Minimum Service Period less any costs we save.

Where a broadband cease (termination) arises either as a cease request or as a consequence of a Migration Authorisation Code not being obtained and/or used in moving the service away from Progress, a cease charge of £45.00 + VAT will be applied, and any usage charges incurred after the termination date remain payable.

35.11.8 We may terminate all or any of the Services by notice equal to the Minimum Cancellation Notice Period (to expire at any time on or after the Minimum Service Period) without our incurring any liability.

35.11.9 Unless otherwise stated in the Specific Terms & Conditions, the Minimum Cancellation Notice Period is 14 days (to expire at any time on or after the Minimum Service Period).

#### **35.12 Assignment**

35.12.1 We may transfer, assign or sub-contract the whole or any part of our rights and obligations under the Agreement. You agree that you will not assign, sub-contract, sell, transfer, lease, licence or charge by way of security any of your rights or obligations under the Agreement. Breach of this restriction in any way (whether successful or not), will result in your Account being terminated.

#### **35.13 Personal Data**

35.13.1 You agree that both we and our employees may hold all names and other information in the Customer Application, in a computerised database, and that we will comply with the Data Protection Act 1998 (the "Act") and associated legislation, in order to safeguard any personal data (as defined in the Act) which you pass to us, in accordance with the Privacy Policy.

35.13.2 You acknowledge that we may, from time to time, be required under regulations and/or legislation to co-operate with and/or disclose data to, government or other bodies and/or authorities.

#### **35.14 Force Majeure**

35.14.1 You agree that we shall not be liable for any and all losses, (including loss of data) damages, costs, claims and other liabilities which arise as a result of any delay or interruption in, or any non-delivery, or missed delivery or failure of the Equipment and/or Services due to circumstances beyond our reasonable control (including, but not limited to, fire, lightning, explosion, war, disorder, flood, industrial dispute, sabotage, weather conditions or acts of local or central Government or other competent authorities, and acts or omissions of our suppliers) (a "Force Majeure Event"). In such circumstances, the time performing our obligations (including any delivery date stipulated in an order form) shall be extended by a period equal to any delay caused to us as a result of a Force Majeure Event, whether or not we have given notice to you of the occurrence of such Force Majeure Event.

35.14.2 Should any event, referred to at Clause 35.14.1 above, continue for more than 90 days, then either we or you may terminate the Agreement forthwith.

#### **35.15 Waiver**

35.15.1 Neither failure nor delay by either you or us in exercising any of your or our rights under the Agreement shall amount to a waiver of any such right, or operate so as to bar the exercise or enforcement of such right at any time in the future.

#### **35.16 Notices**

35.16.1 You agree to keep the contact details which you have provided to us up to date. Any notice or other information to be served by us on you in accordance with this Agreement will be validly sent if in writing and sent by either e-mail or first class post to your last known email or postal address. Any notice sent by first class post will be deemed served two days after posting. Any notice sent by e-mail will be deemed served on the day that it is sent.

35.16.2 Any notice or other information to be served by you on us in accordance with this Agreement will be validly sent if in writing and sent by either by recorded delivery post to our registered office or by email to [admin@progresscomms.co.uk](mailto:admin@progresscomms.co.uk) . Any notice sent by e-mail will be deemed served on the day that it is sent.

#### **35.17 General**

35.17.1 Subject to clause 35.17.5, this Agreement represents the entire agreement and understanding between you and us with regard to the supply of the Equipment and/or Services, to the exclusion of all prior agreements, arrangements and understandings. The Agreement contains express promises and obligations on our part. You agree that any other term which might be implied or incorporated into the Agreement, by statute, at common law or otherwise, is excluded, to the fullest extent permitted by law.

35.17.2 Subject to clause 35.17.5, you acknowledge and agree that in entering into the Agreement you have not relied upon any oral or written representation, statement or understanding (whether negligently or innocently made) by any of our employees, agents, sub-contractors or representatives other than as expressly set out in the Agreement.

35.17.3 You further acknowledge and agree that you will have no remedy in respect of any untrue representation innocently or negligently made by us or any of our employees, agents, sub-contractors or representatives prior to entering into the Agreement upon which you may claim to have relied in entering into the Agreement whether such representation was made orally or in writing.

35.17.4 Subject to clause 35.17.5, the only remedy available to you for a breach by us of the Agreement shall be for breach of contract under the terms of the Agreement.

35.17.5 Nothing in the Agreement shall exclude or limit our liability for fraudulent misrepresentation.

35.17.6 The Agreement shall be governed by and construed in accordance with the laws of England and Wales and you agree to submit to the exclusive jurisdiction of the Courts of England and Wales. In the event that the Agreement is translated into any other language, the English language version shall prevail.

35.17.7 If any provision, clause or sub-clause of the Agreement is held by any competent authority to be void, voidable, illegal, invalid or otherwise unenforceable, but would be valid and/or enforceable if any part of such provision, clause or sub-clause were deleted or modified, then that provision, clause or sub-clause shall apply with such deletion or modification as may be necessary to make it valid and/or enforceable.

35.17.8 If any part of the Agreement or the application of it to any person shall, for any reason, be adjudged by a competent authority to be invalid, void, voidable, illegal or unenforceable such judgement shall not affect the remainder of the Agreement which shall continue in full force and effect.

35.17.9 References to the singular include the plural and vice versa. References to one gender include all other genders and vice versa.

35.17.10 A person who is not a party to the Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Agreement, but this does not affect any right or remedy of any third party which exists or is available apart from that Act.

#### **35.18 Delivery**

35.18.1 Delivery of the Equipment will be made to the address stated on the Customer Application. The Services will be activated

at the address stated on the Customer Application.

35.18.2 We will use reasonable endeavours to deliver the Equipment or activate the Services within the time stated on the acknowledgement of order form. If, despite those endeavours, we are unable for any reason to fulfil any delivery or activation on or by the specified date, we will not be deemed to be in breach of the Agreement, nor (for the avoidance of doubt) will we have any liability to you for any direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and like loss) howsoever caused (including as a result of negligence) by any delay or failure in delivery or activation. Any delay in delivery or activation beyond the stated delivery date (or any extended delivery date under clause 35.14.1) will not entitle you to cancel the Agreement unless and until you have given 30 days' written notice to us requiring the delivery or activation to be made and we have not fulfilled the delivery or activation within that period. Such notice may not be given until after the stated delivery date (or any extended delivery date if applicable). If you cancel the Agreement in accordance with this clause then:

- (a) we will refund to you any sums which you have paid to us in respect of that Agreement or part of the Agreement which has been cancelled; and
- b) you will be under no liability to make any further payments in respect of that Agreement or part of the Agreement which has been cancelled.

35.18.3 Risk of damage to or loss of the Equipment will pass to you upon delivery.

35.18.4 Ownership of the Equipment will not pass to you until we have received in full (in cash or cleared funds) all sums due to us in respect of the Equipment and delivery has occurred.

## **36.0 VOICE OVER IP ("VOIP") TELEPHONY SERVICES**

**36.1** Any order for VOIP telephony services which is accepted by the Company is conditional on you acknowledging that the service:

- may not offer all the features or resilience you may expect from a conventional phone line: and is not a Publicly Available Telephony Service (PATS) and as a result may sometimes be limited, unavailable or disrupted due to events beyond the Company's control e.g. power disruptions, failures or the quality of the broadband connection.
- You agree when we provide Voice over IP telephony services that:
- you are responsible for maintaining up to date location details on our VOIP portal for the use of the emergency services;
- if you use the service outside the United Kingdom you may not be connected to United Kingdom emergency services when dialling 999 or 112;
- emergency operators may not be able to identify your telephone number in order to call you back if the call either cannot be completed, is dropped or disconnected, or if you are unable to speak to tell them your phone number and/or if the service is not operational for any reason, and emergency operators may also not be able to hold your line open in the event that you hang up;
- you understand and accept that you should always have an alternative means of accessing 999 or 112 emergency services as your ability to make 999 or 112 emergency calls cannot be guaranteed and emergency calls may fail if there is a power failure or broadband connection failure;
- you understand and accept that if we suspend or terminate the service you may not be able to dial 999 or 112

## **37.0 Supply of Consultancy Technical or Project Managerial Services**

**37.1** These Terms and Conditions shall apply to either:

37.1.1 The fulfilment of a Requirement through the provision of Consultants / Project Managers on a time and materials basis. The same terms apply to Progress's sub contractors and Progress employees. A temporary contract will be formed between Progress and the Customer when a request to Progress is confirmed via the completion and return of a Consultancy Services Booking Form, or in writing or via email with a valid Purchase Order number (if applicable). Confirmation of a booking for Consultancy / Project Management Services is taken as acceptance of these Terms and Conditions.

OR

37.1.2 The presentation of a defined Deliverable. A contract will be formed between Progress and the Customer when Progress are commissioned via the completion and return of a Consultancy / Project Management Services Booking Form, or in writing or via email with a valid Purchase Order number. Confirmation of a booking for Consultancy / Project Management Services is taken as acceptance of these Terms and Conditions.

37.1.3 For the avoidance of doubt, the Consultancy / Project Management Services Booking Form will clearly state whether the booking is being made for a Requirement OR Deliverable OR both.

**37.2** When sub contractors are to be used, a contract between Progress and the sub contract Consultant / Project Manager will be formed. The contract requires the sub contract Consultant, as is inherent with employees from Progress to observe the rules and regulations governing the Customer's own staff whilst working on the Customer's premises, including any confidentiality undertakings required by the Customer.

**37.3** Cancellation of bookings made by the Customer must be presented in writing. The customer may cancel a confirmed Requirement or Deliverable booking in accordance with the following charges: Cancellation period has to be more than 10 Working Days prior to commencement of the booking. When such a cancellation is provided between 10 - 5 Working Days prior to commencement of the booking then a charge equal to 25% of the total price stated on our quote will be charged. When such a cancellation is provided between within 5 Working Days or less prior to commencement of the booking then a charge equal to 50% of the total price stated on our quote will be charged.

**37.4** Notification of cancellation shall be delivered personally, sent by email, or sent by fax or sent by first class post. Notice is deemed to have been served as follows:

- (A) if personally delivered, sent by e-mail or sent by fax: at the time of delivery save that if it is served after 17:30 hours it is deemed to have been served at 08:30 hours the next working day.
- (B) if posted: one Working Day after the envelope containing it is delivered into the custody of the postal authorities.

**37.5** For all Requirements and Deliverables, the Consultant(s) / Project Manager(s) will record hours of work upon time sheets. These time sheets will be made available to the Customer upon their request.

**37.6** Invoices for work performed by Consultants / Project Managers representing Progress will be levied as follows:

- In the case of the provision of personnel, all work performed by Consultants or Project Managers will be invoiced upon completion of the Requirement when shorter in duration than one week. When the Requirement is longer than one week in duration, invoices will be raised on a weekly basis. The invoice will include the agreed rate for the Consultant / Project Manager and any of their subsequent expenses incurred.

OR

- 37.7.2 In the case of the provision of a Deliverable, all work performed by Progress will be invoiced in accordance with the payment schedule stated in the appendix to the Consultancy Services Booking Form.

**37.7** For work performed on behalf of UK registered companies all amounts invoiced will be subject to VAT payable at the at the period of time prevailing rate.

**37.8** Payment of invoices for Consultancy Services / Project Management must be received in full by Progress within 14 days of the invoice date unless stated otherwise within the payment schedule for a Deliverable. Payment of invoices for Hardware and or Software must be made in accordance with the Consultancy Services Booking Form and any attached appendixes.

**37.9** Progress reserves the right to recover on a full indemnity basis any costs incurred collecting overdue payments.

**37.10** Prior to confirming a Requirement for the provision of a Consultant / Project Manager, the Customer shall have the opportunity to consider the background and experience of the Consultant / Project Manager, as well as the right to interview him or her. Once the Requirement is confirmed the responsibility for the quality and performance of the Consultant rests solely with the Customer at all times.

**37.11** In the event that the Customer is dissatisfied with the quality or performance of personnel provided, the Customer must state in writing, the basis for dissatisfaction. If, in the view of Progress, the situation merits it, then Progress will withdraw the Consultant / Project Manager in question immediately and will use its reasonable endeavours to provide a replacement.

**37.12** Any complaint by the Customer in respect of work performed by a Consultant / Project Manager in respect of the techniques and methodologies used, shall be notified to Progress immediately and by no later than 5 working days after the completion of the Requirement. Failure to do so shall absolve Progress from any liability in respect of the Consultant / Project Manager provided.

**37.13** Progress accepts no responsibility for hardware or software provided by the Customer for a Consultant / Project Manager to work upon. It is the Customer's responsibility to ensure that the hardware and software has been installed and configured correctly for the purpose of the Requirement or Deliverable, unless installation and configuration of the items in question is an inherent function of the Requirement or Deliverable.

**37.14** When it is an inherent function of the Requirement or Deliverable to install and configure hardware and software supplied by the Customer, Progress cannot accept any responsibility for the quality and performance of the items in question. For such items Warranties and Service Agreements must exist directly between the Customer and the supplier or manufacturer of goods.

**37.15** If the Customer requests that Progress's Consultant(s) / Project Manager(s) deal directly with a 3rd party supplier or manufacturer due to a Warranty or Service issue or if the activities of the Consultant(s) / Project Manager(s) are delayed as a result of problems with the items in question, all such time will be deemed as chargeable beyond any time or prices quoted regardless of whether a quote was for a Requirement (time and materials) or Deliverable (fixed price).

**37.16** When it is an inherent function of the Requirement to install and configure hardware and software supplied by Progress, Progress's Terms and Conditions for Supply of 3rd Party Goods and Services shall apply.

**37.17** In producing a Deliverable, Progress will operate within the scope of the appendix attached to the Consultancy Services Booking Form (Definition of Deliverable). When the appendix references a detailed specification for the Deliverable, Progress will work in accordance with the detailed specification. When no such specification exists and the production of such a specification, for approval by the Customer, is NOT part of the Deliverable, the Customer must accept Progress's interpretation of the Deliverable and its component parts.

**37.18** When commissioning Progress to produce a Deliverable, the Customer accepts responsibility for ensuring any text or image (either electronic or printed) provided to Progress, does not infringe copyright or any other laws. The Customer accepts that if the use of any text or images provided by the Customer results in Progress infringing copyright or any other laws, the Customer will be legally liable to pay any fees, fines or other costs associated with their use and publication.

**37.19** Upon receipt of Sign Off from the Customer for a Requirement or Deliverable, the Customer accepts that Progress have satisfactorily fulfilled their responsibilities. Any additional Support and Maintenance that is then required by the Customer will be beyond the scope of the booking in question. All such Support that is required will be chargeable as a separate booking for Consultancy Service OR via separate contractual mechanism for the supply of IT Support Services from Progress.

**37.20** In no circumstances shall the liability of Progress to the Customer exceed the cost of the Requirement or Deliverable.

**37.21** Progress reserves the right to cancel at short notice or substitute a Consultant or Project Manager with another of commensurate skill and certification if necessitated by circumstances beyond reasonable control.

**37.22** The Customer will make no approach or offer relating to employment to the Consultant or Project Manager during the period of the Requirement or production of a Deliverable. Upon completion of the Requirement or Deliverable, the Customer agrees not to engage a Consultant or Project Manager introduced by Progress in any form without the written consent of Progress. Progress reserves the right to charge the Customer accordingly for services required by the introduced Consultant / Project Manager. If a Consultant / Project Manager is engaged in full time employment by a Customer or by any 3rd party introduced by the Customer, it is agreed the Customer shall pay an introductory fee to Progress the equivalent of 35% of the annual remuneration package (including benefits and commission).

**37.23** Any variation of these Terms and Conditions shall be ineffective unless made in writing and signed by a senior representative of the Customer and Progress.

## **38.0 Sale of Goods**

**38.1** Order & Acceptances & Exclusion of Liabilities:

The Customer acknowledges and agrees by placing orders with Progress IT London Ltd that:

38.1.1 This is a business transaction into which both parties are freely entering.



38.1.2 All business transacted is subject to these conditions as set out herein. All other terms and conditions are excluded. Any variations to the standard terms must be in writing and signed by a Director of Progress IT London Ltd and no employee or agency of Progress IT London Ltd has authority to waive or vary these conditions.

38.1.3 On acceptance by Progress IT London Ltd of any order from the Customer, such an order for goods or services cannot be rescinded without written agreement signed by a Director of Progress IT London Ltd.

**38.2 Price and Sales of Services or Goods** - The Customer understands and agrees that:

38.2.1 Any order is accepted only on condition that the price of the services shall be those in force at the date of commencement of the services. Progress IT London Ltd shall give written notification of any price change that shall be implemented between the acceptance of any order and the date of the commencement of the services. All prices and the other sums payable by virtue of these Terms and Conditions are subject to the addition of Value Added Tax or such other tax required to be paid by law at the rate for the time being in force. Work laid down in quotation is a fixed sum cost.

38.2.2 Firm price quotations are valid for a period of one month only from the date of quotation. The sellers may, at their absolute discretion, accept or reject any order placed by the Buyer.

38.2.3 In the event of the Buyer cancelling a part of the order, the Sellers reserve the right to revise the price or prices quoted for goods or services already delivered.

**38.3 Services Specification** -

38.3.1 The Customer shall within 5 working days of the completion of the services carry out at its own expense tests to ensure that the services satisfy the specification as contracted by Progress IT London Ltd and shall notify Progress IT London Ltd in writing within 5 working days period of any failure of the services to meet the contracted specification. If no such written notice is received by Progress IT London Ltd within 7 working days, the Customer shall be deemed to be satisfied by the service(s) provided.

38.3.2 On delivery, the Buyer shall examine the goods for defects and completeness. Thereafter no claim for damage in transit, for shortage in delivery or for loss of goods will be entertained unless, in the case of damage, a separate notice in writing is given to the carriers or to the sellers within three days of the receipt of the goods, followed within 7 days of the date of advice of dispatch by a complete claim in writing; or, in the case of loss of goods, a separate notice in writing and a claim is given to the sellers and carriers within 7 days of the date of the Sellers advice of dispatch to the Buyer. In all cases a signature "unexamined" shall be deemed to be an unconditional acceptance of the goods.

38.3.3 The Sellers shall not in any circumstances be liable, whether in contract or tort, to the Buyer for any indirect or consequential loss or damage (including, without limitation, loss of profits, loss of contracts, or damage to property) or for any claim against the Buyer by any third party and the guarantee given by the Sellers hereunder shall not be transferable to any person.

38.3.4 The Sellers' liability for damage or non-delivery of goods duly notified in accordance with the above shall in any event be limited to replacement of goods within a reasonable time (or, at the Sellers' option, refunding the price thereof) whether the damage or non-delivery is due to the Sellers' negligence or otherwise.

**38.4 Delays**

38.4.1 Progress IT London Ltd will take all reasonable steps to secure completion by the dates given but if completion of the works should be delayed for any reason outside the control of Progress IT London Ltd, Progress IT London Ltd shall within 7 days give written notice to the Customer and a fair and reasonable extension of time for the completion of the works shall be agreed between the parties.

**38.5 Dayworks**

38.5.1 Daywork will be carried out at the rates as authorised and agreed between the parties prior to the commencement of the day-works. Charges for day-work will include labour, plant, materials, establishment charges, and expenses including travelling time. The records for day-work will be provided on standard day-work record forms and will be submitted to the Customer (on request) not later than 15 days following the day in which day-works have been carried out.

**38.6 Maintenance & Retention**

38.6.1 Unless otherwise agreed in writing the Contract shall not be subject to a period of maintenance following completion of the work and no sum of money is to be retained from the amounts due to Progress IT London Ltd from the customer in regard to a period of maintenance of the works.

**38.7 Payment**

38.7.1 Payment for the goods shall be due in full in pounds sterling immediately or within 14 days grace period of invoice (please check invoice for exact terms of payment). Invoices shall be issued on a monthly basis, as progress payments against material on site and services provided during that period.

38.7.2 If payment of the price or any part of it is not made by the due date the Seller shall be entitled to charge interest on overdue accounts at the additional monthly charge of 8% per month above the current bank rates to be added to the originally invoiced amount, as set out by the Late Payments of Commercial Debts Regulations Act 2013, and any further deliveries of Services or Goods will be suspended until the account is paid in full together with any interest.

38.7.3 In the event that the Customer is in arrears in the payment of any sums due or shall have exceeded any agreed written credit limit, Progress IT London Ltd shall be entitled to withdraw any credit facilities, and shall not be obliged to supply any further products, whether orders have been accepted by Progress IT London Ltd or otherwise.

**38.8 Guarantees**

38.8.1 Issuing of some types of guarantees are carried out by a Third Party and will normally take approximately 8 weeks from completion of works. In addition where these types of third party guarantees are in place the Customer has to liaise directly with the relevant supplier for any future complaint on the products supplied or installed.

**38.9 Limitation of Liability**

38.9.1 Progress IT London Ltd shall have no liability for any indirect or consequential losses or expenses suffered by the Customer, however caused, including but not limited to loss of anticipated profit, goodwill, reputation, business receipts or contracts or losses or expenses resulting from third party claims.

38.9.2 Progress IT London Ltd aggregate liability to the Customer, whether for negligence, breach of contract, misrepresentation or otherwise, shall in no circumstances exceed the cost of the services which give rise to such liability in respect of any occurrence or series of occurrences.

**38.10 Contractual Exclusion of the Customers Right to Set Off and Abatement**

38.10.1 The Customer hereby agrees that all sums due to Progress IT London Ltd under the Agreement between them shall be paid in cash immediately when due without deduction and expressly agrees that no payment shall be withheld or deferred on

account of any claim, counterclaim or set off and acknowledges that any claim of whatsoever nature by the Customer gains Progress IT London Ltd must be the subject of separate proceedings and that the rule of abatement is expressly excluded from this Contract.

### **38.11 Delivery by the Sellers**

38.11.1 Any dates quoted for delivery of the goods are approximate only and the Sellers shall not be liable for any delay in delivery of the goods howsoever caused. Time for delivery shall not be of the essence unless previously and expressly agreed by the Sellers in writing. Where the goods are offered for delivery to a site, the Sellers' obligation is to deliver as near to the site as safe hard roads permit. The Buyer is to provide at its own expense the labour required for unloading and stacking.

## **39.0 Consultancy agreement with other companies**

### **39.1 Order & Acceptances of Consultancy agreement with other Companies**

39.1.1 Consultancy agreement is the contract between Progress or Consultant Company and any other Company or Provider for the supply or provision of Services on behalf of Progress or vice versa. Contracting Company is the company or individual carrying out works or Services on behalf of Progress or whenever Progress carries out works or Services on behalf of another Company.

### **39.2 Definitions and rules of interpretation**

39.2.1 Board is the board of directors of the Company (including any committee of the board duly appointed by it).

39.2.2 Business Opportunities are those opportunities which the Consultant Company or the Individual becomes aware of during the Engagement which relate to the business of [the Company OR any Group Company] or which the Board reasonably considers might be of benefit to [the Company OR any Group Company].

39.2.3 Capacity as agent, consultant, director, employee, owner, partner, shareholder or in any other capacity.

39.2.4 Commencement date is the actual date of starting the Works at the client site of the Company.

39.2.5 Confidential Information is the information (whether or not recorded in documentary form, or stored on any magnetic or optical disk or memory) relating to the business, products, affairs and finances of [the Company OR any Group Company] for the time being confidential to [the Company OR any Group Company] and trade secrets including, without limitation, technical data and know-how relating to the business of [the Company OR any Group Company] or any of its [or their] business contacts, including in particular (by way of illustration only and without limitation). For instance training or other means of acquiring the required skills in order to carry out the necessary work can be provided but not passed on in any way to external agents or competitors to the Company.

39.2.6 Engagement is the actual engagement of the Contracting Company by the Company on the terms of this agreement.

39.2.7 Group Company is the Company, any company of which it is a Subsidiary (its holding company) and any other Subsidiaries of the Company or any such holding company.

39.2.8 Individual is any person representing any other Company or Provider who is acting as Managing Director of the Contracting Company, or he is the sole agent of such.

39.2.9 Insurance Policies are a requirement from any Contracting Company or Provider carrying out Works and these include Commercial general liability insurance cover, Employer's liability insurance cover, and Public liability insurance cover.

39.2.10 Intellectual Property Rights are patents, rights to Inventions, copyright and related rights, trademarks, trade names and domain names, rights in get-up, rights in goodwill or to sue for passing off, rights in designs, rights in computer software, database rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered and including all applications (or rights to apply) for, and renewals or extensions of, such rights and all similar or equivalent rights or forms of protection which may now or in the future subsist in any part of the world.

39.2.11 Invention is any invention, idea, discovery, development, improvement or innovation made by the Consultant Company or by the Individual in connection with the provision of the Services, whether or not patentable or capable of registration, and whether or not recorded in any medium.

39.2.12 Pre-Contractual Statement is any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the Engagement other than as expressly set out in this agreement [or any documents referred to in it].

39.2.13 Quarter is any period of three consecutive calendar months which shall commence on the Commencement Date or any date which is the day after the end of the previous quarter.

39.2.14 Services are the services described in the Instruction **Error! Reference source not found.** or Schedule of Works which are to be supplied from time to time via email, land mail or fax by the Contracting Company.

39.2.15 Subsidiary in relation to a company (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.

39.2.16 Substitute is the actual substitute for the Individual appointed under the terms of clause numbered 28.5.3 below.

39.2.17 Termination Date is the date of termination of this agreement howsoever arising.

39.2.18 Works are all records, reports, documents, papers, drawings, designs, transparencies, photos, graphics, logos, typographical arrangements, software programs, inventions, ideas, discoveries, developments, improvements or innovations and all materials embodying them in whatever form, including but not limited to hard copy and electronic form, prepared by the Contracting Company or the Individual in connection with the provision of the Services.

### **39.3 General Terms of this agreement**

39.3.1 The headings in this agreement are inserted for convenience only and shall not affect its construction.

39.3.2 A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.

39.3.3 A reference to one gender includes a reference to the other gender.

39.3.4 The schedules to this agreement form a part (and are incorporated into) this agreement.

### **39.4 Term of engagement**

39.4.1 The Company shall engage the Contracting Company and the Contracting Company shall make available to the Company the Individual to provide the Services on the terms of this agreement.

39.4.2 The Engagement shall [commence OR be deemed to have commenced] on the Commencement Date and shall continue unless and until terminated:

A. As provided by the terms of this agreement; or

B. By either party giving to the other not less than two months' prior written notice.

### **39.5 Duties**

39.5.1 During the Engagement the Contracting Company shall, and (where appropriate) shall procure that the Individual shall:

A. Provide the Services with all due care, skill and ability and use its or his best endeavours to promote the interests of [the Company OR any Group Company];

B. Unless the Individual is prevented by ill health or accident, devote at least the required number of hours or days in each calendar month to the carrying out of the Services together with such additional time if any as may be necessary for their proper performance and requirements of the work instructions as laid out by the Company;

C. Promptly give to the Board all such information and reports as it may reasonably require in connection with matters relating to the provision of the Services or the business of [the Company OR any Group Company].

39.5.2 If the Individual is unable to provide the Services due to illness or injury the Contracting Company shall advise the Company of that fact as soon as reasonably practicable and shall provide such evidence of the Individual's illness or injury as the Company may reasonably require. For the avoidance of doubt, no fee shall be payable in accordance with clause 4 below in respect of any period during which the Services are not provided.

39.5.3 The Contracting Company may, with the prior written approval of the Company or Board and subject to the following proviso, appoint a suitably qualified and skilled Substitute to perform the Services instead of the Individual, provided that the substitute shall be required to enter into direct or indirect undertakings with the Company, including with regard to confidentiality. If the Company accepts the Substitute, the Contracting Company shall continue to invoice the Company in accordance with the agreement and shall be responsible for the remuneration of the Substitute.

39.5.4 The Contracting Company shall procure that the Individual is available at all time on reasonable notice to provide such assistance or information as the Company may require.

39.5.5 Unless it or has been specifically authorised to do so by the Company in writing:

A. Neither the Contracting Company nor the Individual shall have any authority to incur any expenditure in the name of or for the account of the Company; or

B. The Contracting Company shall not hold itself (and shall procure that the Individual shall not hold himself) out as having authority to bind the Company.

39.5.6 The Contracting Company shall, and shall procure that the Individual shall, comply with all reasonable standards of safety and comply with the Company's health and safety procedures from time to time in force at the premises where the Services are to be provided and report to the Company any unsafe working conditions or practices.

39.5.7 The Contracting Company undertakes to the Company that during the Engagement it shall, and shall procure that the Individual shall, take all reasonable steps to offer (or cause to be offered) to the Company any Business Opportunities as soon as practicable after the same shall have come to its or his knowledge and in any event before the same shall have been offered by the Contracting Company or the Individual (or caused by the Contracting Company or the Individual to be offered to) any other party [provided that nothing in this clause shall require the Contracting Company or the Individual to disclose any Business Opportunities to the Company if to do so would result in a breach by the Contracting Company or the Individual of any obligation of confidentiality or of any fiduciary duty owed by it or him to any other person, firm or company].

39.5.8 The Contracting Company may use another person, firm, company or organisation to perform any administrative, clerical or secretarial functions which are reasonably incidental to the provision of the Services provided that the Company will not be liable to bear the cost of such functions.

### **39.6 Fees**

39.6.1 In consideration of the provision of the Services, the Company shall within 30 days of receipt of an invoice submitted in accordance with other clauses herewith, pay to the Contracting Company a pre-agreed fee (subject to the completed jobs per calendar month) exclusive of Value Added Tax, such fee to be payable by bank transfer in arrears.

39.6.2 The Contracting Company shall, on the last working day of each month during the Engagement, submit to the Company an invoice which gives details of the hours which the Individual [or any Substitute] has worked, the Services which have been provided by the Contracting Company and the amount of the fee payable (plus VAT, if applicable) for such Services during that month.

39.6.3 The Company shall be entitled to deduct from the fees (and any other sums) due to the Contracting Company any sums that the Contracting Company [or the Individual] may owe to [the Company OR any Group Company] at any time.

### **39.7 Expenses**

39.7.1 The Company shall reimburse (or procure the reimbursement of) all reasonable pre-agreed expenses properly and necessarily incurred by the Contracting Company or the Individual in the course of the Engagement, subject to production of receipts or other appropriate evidence of payment OR The Contracting Company shall bear its own expenses.

39.7.2 If the Individual is required to travel abroad in connection with the provision of the Services, the Contracting Company shall be responsible for any necessary insurances, inoculations and immigration requirements.

### **39.8 Other Activities**

39.8.1 Nothing in this agreement shall prevent the Contracting Company or the Individual from being engaged, concerned or having any financial interest in any Capacity in any other business, trade, profession or occupation during the Engagement provided that:

A. Such activity does not cause a breach of any of the Contracting Company's obligations under this agreement; and

B. The Contracting Company shall not, and shall procure that the Individual shall not, engage in any such activity if it relates to a business which is similar to or in any way competitive with the business of the Company or any Group Company without the prior written consent of the Company or Board.

### **39.9 Confidential Information and Company Property**

39.9.1 The Contracting Company acknowledges that in the course of the Engagement it and the Individual will have access to Confidential Information. The Contracting Company has therefore agreed to accept the restrictions in this clause.

39.9.2 The Contracting Company shall not, and shall procure that the Individual shall not (except in the proper course of its or his duties) either during the Engagement or at any time after the Termination Date, use or disclose to any firm, person or company (and shall use its best endeavours and procure that the Individual shall use its best endeavours to prevent the publication or disclosure of) any Confidential Information. This restriction does not apply to:

A. Any use or disclosure authorised by the Company or required by law; or

B. Any information which is already in, or comes into, the public domain otherwise than through the Contracting Company's or the Individual's unauthorised disclosure.

**39.9.3** All documents, manuals, hardware and software provided for the Individual's use by the Company, and any data or documents (including copies) produced, maintained or stored on the Company's computer systems or other electronic equipment (including mobile phones if provided by the Company), remain the property of the Company.

**39.10 Data Protection**

**39.10.1** The Contracting Company shall procure that the Individual consents to the Company holding and processing data relating to him for legal, personnel, administrative and management purposes and in particular to the processing of any "sensitive personal data" (as defined in the Data Protection Act 1998) relating to the Individual including, as appropriate:

- A. information about the Individual's physical or mental health or condition in order to monitor sick leave and take decisions as to the Individual's fitness for work; or
- B. the Individual's racial or ethnic origin or religious or similar beliefs in order to monitor compliance with equal opportunities legislation;
- C. information relating to any criminal proceedings in which the Individual has been involved for insurance purposes and in order to comply with legal requirements and obligations to third parties; and
- D. any other sensitive data to be processed, e.g. union membership, political or other opinions or sexual life.

**39.10.2** The Contracting Company consents (and shall procure that the Individual consents) to the Company making such information available to [any Group Company,] those who provide products or services to the Company [and any Group Company] (such as advisers), regulatory authorities, governmental or quasi governmental organisations and potential purchasers of the Company or any part of its business.

**39.10.3** The Contracting Company consents (and shall procure that the Individual consents) to the transfer of such information to the Company's [and any Group Company's] business contacts outside the European Economic Area in order to further [its OR their] business interests.

**39.11 Intellectual Property**

**39.11.1** The Contracting Company warrants to the Company that it has obtained from the Individual a written and valid assignment of all existing and future Intellectual Property Rights in the Works and of all materials embodying such rights and a written irrevocable waiver of all the Individual's statutory moral rights in the Works, to the fullest extent permissible by law, and that the Individual has agreed to hold on trust for the Contracting Company any such rights in which the legal title has not passed (or will not pass) to the Contracting Company. The Contracting Company agrees to provide to the Company a copy of this assignment on or before the date of this agreement.

**39.11.2** The Contracting Company hereby assigns to the Company all existing and future Intellectual Property Rights in the Works and the Inventions and all materials embodying such rights to the fullest extent permitted by law. Insofar as they do not so vest automatically by operation of law or under this agreement, the Contracting Company holds legal title in such rights and inventions on trust for the Company.

**39.11.3** The Contracting Company undertakes to the Company:

- A. to notify to the Company in writing full details of all Works and Inventions promptly on their creation;
  - B. to keep confidential the details of all Inventions;
  - C. whenever requested to do so by the Company and in any event on the termination of the Engagement, promptly to deliver to the Company all correspondence, documents, papers and records on all media (and all copies or abstracts of them), recording or relating to any part of the Works and the process of their creation which are in his possession, custody or power;
  - D. not to register nor attempt to register any of the Intellectual Property Rights in the Works, nor any of the Inventions, unless requested to do so by the Company; and
  - E. to do all acts necessary to confirm that absolute title in all Intellectual Property Rights in the Works and the Inventions has passed, or will pass, to the Company,
- And confirms that the Individual or Substitute has given written undertakings in the same terms to the Contracting Company.

**39.11.4** The Contracting Company warrants that:

- A. it has not given and will not give permission to any third party to use any of the Works or the Inventions, nor any of the Intellectual Property Rights in the Works;
- B. it is unaware of any use by any third party of any of the Works or Intellectual Property Rights in the Works; and
- C. the use of the Works or the Intellectual Property Rights in the Works by the Company will not infringe the rights of any third party, and confirms that the Individual has given written undertakings in the same terms to the Contracting Company.

**39.11.5** The Contracting Company acknowledges that no further remuneration or compensation other than that provided for in this agreement is or may become due to the Contracting Company in respect of the performance of its obligations under this clause.

**39.11.6** The Contracting Company undertakes to execute all documents, make all applications, give all assistance and do all acts and things, at the expense of the Company and at any time either during or after the Engagement, as may, in the opinion of the [Company OR Board], be necessary or desirable to vest the Intellectual Property Rights in, and register or obtain patents or registered designs in, the name of the Company and otherwise to protect and maintain the Intellectual Property Rights in the Works. The Contracting Company confirms that the Individual has given written undertakings in the same terms to the Contracting Company.

**39.11.7** The Contracting Company hereby irrevocably appoints the Company to be its attorney to execute and do any such instrument or thing and generally to use its name for the purpose of giving the Company or its nominee the benefit of this clause xxx [and acknowledges in favour of a third party that a certificate in writing signed by any director or the secretary of the Company that any instrument or act falls within the authority conferred by this clause shall be conclusive evidence that such is the case.

**39.12 Insurance and Liability**

**39.12.1** The Contracting Company shall have liability for any loss, liability or costs (including reasonable legal costs) incurred by the Company in connection with the provision of the Services and shall accordingly maintain in force during the Engagement full and comprehensive Insurance Policies in respect of the provision of the Services.

39.12.2 The Contracting Company shall ensure that the Insurance Policies are taken out with reputable insurers acceptable to the Company and that the level of cover and other terms of insurance are acceptable to and agreed by the Company.

39.12.3 The Contracting Company shall (on request) supply to the Company on request copies of such Insurance Policies and evidence that the relevant premiums have been paid.

39.12.4 The Contracting Company shall notify the insurers of the Company's interest and shall cause such interest to be noted on the Insurance Policies [together with a provision to the effect that, if any claim is brought or made by the Company against the Contracting Company in respect of which the Contracting Company would be entitled to receive indemnity under any of the Insurance Policies, the relevant insurer will indemnify the Company directly against such claim and any charges, costs and expenses in respect of such claim. If the relevant insurer does not so indemnify the Company, the Contracting Company shall use all insurance monies received by it to indemnify the Company in respect of any claim and shall make good any deficiency from its own resources.

39.12.5 The Contracting Company shall comply (and shall procure that the Individual complies) with all terms and conditions of the Insurance Policies at all times. If cover under the Insurance Policies shall lapse or not be renewed or be changed in any material way or if the Contracting Company is aware of any reason why the cover under the Insurance Policies may lapse or not be renewed or be changed in any material way, the Contracting Company shall notify the Company without delay.

### **39.13 Termination**

39.13.1 Notwithstanding the provisions of other clauses herewith **Error! Reference source not found.**, the Company may terminate the Engagement with immediate effect without notice and without any liability to pay any remuneration, compensation or damages if at any time:

- A. the Contracting Company or the Individual is guilty of gross misconduct affecting the business of [the Company or any Group Company]; or
- B. the Contracting Company or the Individual commits any serious or repeated breach or non-observance of any of the provisions of this agreement or refuses or neglects to comply with any reasonable and lawful directions of the Company; or
- C. the Individual is convicted of any criminal offence (other than an offence under any road traffic legislation in the United Kingdom or elsewhere for which a fine or non-custodial penalty is imposed); or
- D. the Contracting Company or the Individual is in the reasonable opinion of the Board negligent and incompetent in the performance of the Services; or
- E. the Individual is declared bankrupt or makes any arrangement with or for the benefit of his creditors or has a county court administration order made against him under the County Court Act 1984; or
- F. the Contracting Company makes a resolution for its winding up, makes an arrangement or composition with its creditors or makes an application to a court of competent jurisdiction for protection from its creditors or an administration or winding-up order is made or an administrator or receiver is appointed in relation to the Contracting Company; or
- G. the Individual is incapacitated (including by reason of illness or accident) from providing the Services for an aggregate period of 5 [five] working days in any [52 week] consecutive period; or
- H. the Individual does not own all of the issued share capital (from time to time) of the Contracting Company; or
- I. the Contracting Company or the Individual is guilty of any fraud or dishonesty or acts in any manner which in the opinion of the [Company OR Board] brings or is likely to bring the Individual, the Contracting Company, or [the Company OR any Group Company] into disrepute or is materially adverse to the interests of [the Company OR any Group Company].

39.13.2 The rights of the Company under these clauses are without prejudice to any other rights that it might have at law to terminate the Engagement or to accept any breach of this agreement on the part of the Contracting Company as having brought the agreement to an end. Any delay by the Company in exercising its rights to terminate shall not constitute a waiver thereof.

### **39.14 Obligations upon Termination**

39.14.1 On the Termination Date the Contracting Company shall, and shall procure that the Individual shall:

- A. immediately deliver to the Company all documents, books, materials, records, correspondence, papers and information (on whatever media and records, correspondence, papers and information (on whatever media and wherever located) relating to the business or affairs of [the Company OR any Group Company] [or its OR their] business contacts], any keys, and any other property of [the Company OR any Group Company], which is in its or his possession or under its or his control;
- B. irretrievably delete any information relating to the business of [the Company OR any Group Company] stored on any magnetic or optical disk or memory and all matter derived from such sources which is in its or his possession or under its or his control outside the premises of the Company; and
- C. provide a signed statement that it or he has complied fully with its or his obligations under this clause.

### **39.15 Status**

39.15.1 The relationship of the Contracting Company (and the Individual) to the Company will be that of independent contractor and nothing in this agreement shall render it (nor the Individual) an employee, worker, agent or partner of the Company and the Contracting Company shall not hold itself out as such and shall procure that the Individual shall not hold himself out as such.

39.15.2 This agreement constitutes a contract for the provision of services and not a contract of employment and accordingly the Contracting Company shall be fully responsible for and shall indemnify the Company [or any Group Company] for and in respect of payment of the following within the prescribed time limits:

- A. any income tax, National Insurance and Social Security contributions and any other liability, deduction, contribution, assessment or claim arising from or made in connection with either the performance of the Services or any payment or benefit received by the individual (or their associates) in respect of the Services, where such recovery is not prohibited by law. The Contracting Company shall further indemnify the Company against all reasonable costs, expenses and any penalty, fine or interest incurred or payable by the Company in connection with or in consequence of any such liability, deduction, contribution, assessment or claim [other than where the latter arise out of the Company's negligence or wilful default];
- B. any liability for any employment-related claim or any claim based on worker status (including reasonable costs and expenses) brought by the Individual or any Substitute against the Company arising out of or in connection with the provision of the Services, except where such claim is as a result of any act or omission of the Company.

39.15.3 The Company may at its option satisfy such indemnity (in whole or in part) by way of deduction from payments due to the Contracting Company or the Individual.

**39.15.4** The Contracting Company warrants that it is not nor will it prior to the cessation of this Agreement, become a Managed Service Company, within the meaning of section 61B, Income Tax (Earnings and Pensions) Act 2003.

#### **39.16 Notices**

**39.16.1** Any notice given under this agreement shall be in writing and signed by or on behalf of the party giving it and shall be served by delivering it personally, or sending it by pre-paid recorded delivery or registered post to the relevant party at its registered office for the time being [or by sending it by fax to the fax number notified by the relevant party to the other party]. Any such notice shall be deemed to have been received:

- A. if delivered personally, at the time of delivery;
- B. in the case of pre-paid recorded delivery post, 48 hours from the date of posting;
- C. in the case of fax at the time of transmission.

**39.16.2** In proving such service it shall be sufficient to prove that the envelope containing such notice was addressed to the address of the relevant party and delivered either to that address or into the custody of the postal authorities as a pre-paid recorded delivery or registered post [or that the notice was transmitted by fax to the fax number of the relevant party].

#### **39.17 Entire Agreement and Previous Contracts**

**39.17.1** Each party on behalf of itself [and (in the case of the Company, as agent for any Group Companies)] acknowledges and agrees with the other party [(the Company acting on behalf of itself and as agent for each Group Company)] that:

- A. this agreement [together with any documents referred to in it] constitute[s] the entire agreement and understanding between the Contracting Company and the Company [and any Group Company] and supersedes any previous agreement between them relating to the Engagement (which shall be deemed to have been terminated by mutual consent);
- B. in entering into this agreement neither party [nor any Group Company] has relied on any Pre-Contractual Statement; and
- C. the only remedy available to it for breach of this agreement shall be for breach of contract under the terms of this agreement and each party shall have no right of action against any other party in respect of any Pre-Contractual Statement. Nothing in this agreement shall, however, operate to limit or exclude any liability for fraud.

#### **39.18 Variation**

**39.18.1** No variation of this agreement [or of any of the documents referred to in it] shall be valid unless it is in writing and signed by or on behalf of each of the parties.

#### **39.19 Counterparts**

**39.19.1** This agreement may be executed in any number of counterparts, each of which, when executed [and delivered], shall be an original, and all the counterparts together shall constitute one and the same instrument

#### **39.20 Third Party Rights**

**39.20.1** The Contracts (Rights of Third Parties) Act 1999 shall not apply to this agreement and no person other than the Contracting Company and the Company shall have any rights under it. The terms of this agreement or any of them may be varied, amended or modified or this agreement may be suspended, cancelled or terminated by agreement in writing between the parties or this agreement may be rescinded (in each case), without the consent of any third party.

## **40.0 WEBSITE BUILD & DESIGN TERMS OF USE**

### **40.1 YOUR STATUTORY RIGHTS ARE NOT AFFECTED BY ANY OF THE FOLLOWING TERMS AND CONDITIONS**

40.1.1 A 'Project' is any work undertaken or service provided by Progress for the Client on their request and as described in our confirmation order email to that Client.

40.1.2 A 'Client' is a person, persons, business or organization using any of the services provided by Progress IT London Ltd.

40.1.3 'Live Mode' means the date the website is available on the Client's chosen domain.

40.1.4 'Domain' is the website address as specified by the Client.

40.1.5 'Hosting' is a yearly cost to keep a Client's website activated online.

### **40.2 SERVICES AND CONDITIONS OF USE**

Progress IT London Ltd agrees to provide you with information and other services that we may decide to offer, subject to the terms of agreement. These terms and conditions are subjected to change without notice, from time to time in our sole discretion. We will notify you of amendments to these terms and conditions by posting them to our website.

### **40.3 TERMS AND CONDITIONS GENERAL**

Progress never start the work of a website without receiving the necessary contact details of its client (Name, Address and Telephone Number). In order to switch the website on live, it's mandatory that the address proof needs to be provided.

We will commence the work of your website only when you agree to the terms and conditions stated in our website.

Progress will carry out work only where an agreement is provided either by email, mail or Client's login area. We will carry out work only for Clients who are 18 years of age or above. An 'order' is deemed to be a written and verbal contract between the Company and the Client; this includes telephone and email agreements.

Quotations submitted by the Company shall remain open for acceptance by the Client for a period of 14 (fourteen) days from the date of the Quotation (unless in the Quotation some other period is specified) or when Progress withdraws the Quotation. The minimum length of any ongoing website services purchased will be 12 months.

The Client shall, at the time of submission of an Order to Progress, pay to the Company a non-refundable deposit for the Services specified on the Order of 25% of the value shown on the Order ("Deposit").

### **40.4 WEBSITE DESIGN**

40.4.1 Progress will make every effort to ensure that the website and any scripts or programs are free of errors; Progress cannot accept responsibility for any losses incurred due to malfunction, the website or any part of it.

40.4.2 The website, graphics and any programming code remain the property of Progress until all outstanding accounts are paid in full.

40.4.3 Any scripts, PHP scripts, DOTNET scripts, graphics, web program, web applications or software (unless specifically agreed) written by Progress remain the copyright of Progress and may only be commercially reproduced or resold with the permission of the Company.

40.4.4 The Company cannot take responsibility for any copyright infringements caused by materials submitted by the Client or on the website after it is opened to public. We reserve the right to refuse any material of a copyrighted nature unless adequate proof is given of permission to use such material.

40.4.5 The Client unconditionally agrees and guarantees that all texts, graphics or other artwork furnished to Progress for the web design project are owned by the Client, or that the Client has permission from the rightful owner. The Client agrees to protect and defend Progress and its subcontractors from any claim or suit arising from the use of such elements furnished by the Client.

40.4.6 Once the website has been made public, any additions or corrections provided by the Client will be carried out at the discretion of Progress and there will be an additional charge per page for such extras.

40.4.7 The Client agrees to make available as soon as is reasonably possible to the Company all materials required to complete the site to the agreed standard and within the set deadline of 45 days. If the Client fails to supply required materials within the specified time Progress hold the right to cancel the project.

40.4.8 Progress will not be liable for costs incurred, compensation or loss of earnings due to the failure to meet agreed deadlines.

40.4.9 Progress will not be liable or become involved in any disputes between the site owner and their Clients or Suppliers or Resellers and cannot be held responsible for any wrong doing on the part of a site owner. i.e. Any disputes regarding content/images/terms between their Clients or Suppliers or Resellers that have been provided to us for inclusion on the site.

40.4.10 Progress will not be liable or become involved in any disputes between the site owner and their Clients and cannot be held responsible for any wrong doing on the part of a site owner. i.e. Any disputes regarding content/images that have been provided to us for inclusion on the site.

40.4.11 Progress will not be liable for any costs incurred, compensation or loss of earnings due to the work carried out on behalf of the Client or any of the Clients appointed agents.

40.4.12 The Client has to supply a brief description, navigation requirements about their web project and also has to supply texts, contents, images, payment gateway details, any third-party software and applications to be integrated in the website.

40.4.13 Any fees or charges for third party software, applications and stores like eBay, Amazon, should be paid by the Client. Any third- party advertisement campaigns like Google ad words, yahoo etc. should be paid by the Client.

40.4.14 The Company is not responsible to take backups or save any files of the website, the Clients have to do the necessary arrangements for the same.

40.4.15 All creation files remain the intellectual property of Progress on completion of a web design project. Progress shall be free to reproduce, use, disclose, display, exhibit, transmit, perform, create derivatives works, and distribute any item from the Clients web pages unless specifically agreed to do otherwise. Furthermore, Progress shall be free to use any ideas, concepts, know how or techniques acquired in the construction of websites for any purpose whatsoever including but not limited to developing, manufacturing and marketing products and any other items incorporating such information unless specifically agreed otherwise.

#### **40.5 APPLICATION AND E-COMMERCE DEVELOPMENT**

40.5.1 Progress cannot take responsibility for any losses incurred by the use of any software created for the Client. Whilst every care has been taken to ensure products are problem free and accurate, the ultimate responsibility lies with the Client in ensuring that all software is functioning correctly before use.

40.5.2 Where applications or sites are developed on servers not recommended by Progress, the Client is expected to provide or seek any information, additional software, support or co-operation pertaining to the server required in order for the application to be correctly developed. Where large applications are to be developed, it is the Client's responsibility to provide a suitable testing environment which is identical to the final production environment.

40.4.3 The Client is expected to test fully any application or programming relating to a site developed by the Company before being made generally available for use. Where "bugs", errors or other issues are found after the site is live, Progress will endeavor (but is not obliged to) to correct these issues to meet the standards of function outlined in the brief.

#### **40.6 SOURCE CODE**

You can buy the complete source code for an extra of 30% of the total quote for the web development or software development. Once all the website/software development works has been completed, we will provide a downloadable link to download the complete files for the web development or software development.

#### **40.7 HOSTING WITH THIRD PARTY SERVERS**

If the client chooses their own server we will send the full source code as above mentioned for an extra of 30% to the total quote and after that we cannot support on technical issues

#### **40.8 CUSTOMER OBLIGATIONS**

40.8.1 The Client should agree to co-operate with and assist Progress in the performance of the services requested pursuant to this Agreement and will provide the resources necessary for Progress performance hereunder as specified in the work order.

40.8.2 The Client will make available to the Company at least one qualified staff member who will have authority to act on behalf of the Client, provide information and data concerning Client's operations and activities, advise Progress of Client's requirements and provide access to Client's facilities at all reasonable times during the performance of the services required pursuant to this Agreement.

40.8.3 The Client has to provide a proof of address and landline number to make sure that the Client's website activities are carried out from UK postal address.

#### **40.9 MAINTENANCE**

40.9.1 Progress provides a two-week testing period after the site launch. During this period, any technical issues will be resolved at no cost. After this period, Progress's obligations under the contract will be deemed fulfilled and the contract concluded. Any changes to the website following the testing stage and conclusion of the contract will be charged separately. Progress offers a Web Hosting and Maintenance package which will accommodate basic changes to the site (text and project photos) at any time. Please inquire with Progress representative.

40.9.2 A free Web Hosting will be provided for 1 year if you allow us to put our logo/link at the bottom or footer of your website.

#### **40.10 COMPATIBILITY**

Progress will endeavor to ensure that any developed/designed site or application will function correctly on the server it is initially installed in and that it will function correctly when viewed with the web browsing software Microsoft Internet Explorer Version 6 and to an acceptable level with Mozilla browsers. The Company can offer no guarantees of correct function with all browser software.

#### **40.11 WEBSITE HOSTING**

40.11.1 Whilst Progress recommends hosting companies to host websites, no guarantees can be made as to the availability or interruption of this service, and Progress cannot accept liability for losses caused by the unavailability, malfunction or interruption of this service, or for loss of turnover, sales, revenue, profits or indirect, consequential or special loss.

40.11.2 When a Client renews "Web Hosting" with Progress, this can also include Domain Name renewal and the renewal is needed to keep the site functioning. If the Client does not renew the Domain, their Domain name could be made available to the public for purchase and Progress cannot be held liable for this.

40.11.3 Renewal of "Web Hosting" is due on a yearly basis. The date of renewal will be annually from the date the website was ordered by the Client. The "Web Hosting" will not be renewed if we cannot contact the customer or the customer requests for us to not host this site. This will also affect the Domain.

40.11.4 The Web Hosting renewal charge must be received within 30 days of the hosting expiry date. We reserve the right to deactivate any website where the hosting has expired and the Client has not paid the renewal charge. There will be an admin fee set by Progress for reactivating the website / hosting.

40.11.5 Progress reserve the right to refuse to handle in any way, material which may be deemed offensive, illegal or in any way controversial, and also to terminate the free hosting service should the necessity arise.

#### **40.12 SUPPORT ON THIRD PARTY SERVER**

We will give the source code as a zip file. If the client wants us to set it up on their server then we will charge £80 + VAT and we will set it up on their server and we will also charge 30% for source code.

#### **40.13 WEBSITE OPTIMIZATION**

40.13.1 Due to external factors, such as changes in the way search engines rank websites, we cannot offer any guarantees regarding the position your website would achieve. The process of optimizing the website itself (on-site optimization) will bring in more traffic and you will see increased visits to your site, naturally. We cannot accept liability for drop in your website's ranking, or drop off in the position of your website. Changes in algorithms of the search engines or the factors that they use to rank websites shall reflect on a website's ranking at any given time.

40.13.2 We use 'white hat techniques' when optimizing websites and always aim to achieve a top ten ranking for your website within six months of undertaking the optimization process. But we cannot offer any guarantees regarding the position we would achieve within 6 months. Due to the amount of work involved and personnel required, payment is generally required in advance. Also, we do not offer refunds of any kind for this type of work. We send you a performance & analytics report every fortnight so that you may track our efforts and results.

40.13.3 We do basic SEO for all sites we develop. But for keywords with heavy competition, this may not be adequate and we will need to do advanced SEO. Your site's ranking will also be affected if any of your competitors are doing SEO for their sites. Even if we do advanced SEO, it will take about six months to get all the keywords to the top ten positions. We have a dedicated SEO team with ample experience and we always keep ourselves updated with the new trends in SEO.

#### **40.14 DATA ENTRY**

We can do the full data entry for the website from the current or reference website, provided by the Client, to the new website with an extra hourly charge (to be agreed with the Client) if you need any data entry jobs on your website.

#### **40.15 INTELLECTUAL PROPERTY RIGHTS AND OTHER CONSENTS**

You are solely responsible for obtaining any and all necessary intellectual property rights clearances and/or other consents and authorization's in respect of the Services, including without limitation, clearance and/or consents in respect of your proposed domain name and merchant services agreements between you and the relevant banks in respect of your operation of an Online Store.

#### **40.16 INDEMNITY**

You agree to indemnify and keep indemnified and hold us on demand harmless from and against any claim brought against us by a third party resulting from the provision of Services by us to you and your use of our services, and in respect of all losses, costs, actions, proceedings, claims, damages, expenses (including reasonable legal costs and expenses), or liabilities, whatsoever suffered and howsoever incurred by us in consequence of your breach or non-observance of these terms of business.

#### **40.17 PAYMENT OF ACCOUNTS**

40.17.1 Progress will not do a non-cost editing of a content/s which is notified after 30 days from making a site live.

40.17.2 Further editing of a content/s which is notified after 30 days from making the site live will be charged depending upon the complexity of the work.

40.17.3 The Client shall make all payments due to Progress by bankers draft or electronic transfer direct to the Company bank account or by setting up Direct Debit mandate with us.

40.17.4 If the Client fails to pay any amount due to Progress under this Agreement on the relevant due date, default interest at the rate specified by the Late Payment of Commercial Debts (Interest) Act 1998 shall be added to such amount for the period from the day after the due date until the date of receipt (whether before or after judgment) together with any reasonable and proper amounts incurred by Progress in seeking to recover such late payment from the Client (including, without limitation, legal fees).

40.17.5 A deposit is required from any new Client before any work is carried out. It is the Company's policy that any outstanding accounts for work carried out by Progress or its affiliates are required to be paid in full, no later than 14 days from the date of the invoice unless by prior arrangement with us.

40.17.6 Once a deposit is paid and work completed you are obliged to pay the balance of payment in full. We will contact Clients via email and telephone to remind them of such payments if they are not received when due.

40.17.7 If accounts are not settled or Progress have not been contacted regarding the delay, access to the related website may be denied and web pages removed, we will then pass such cases to the Small Claims Court to pursue payment, nonpayment can result in County Court Judgments being added to the Clients credit rating.

40.17.8 Following consistent nonpayment of an invoice our Solicitors will contact the Client in question, with a view to taking the matter further and if need be to seek payment through legal procedures, and if necessary court summons.

40.17.9 Progress will only commence work on a project after receipt of 50% deposit of the quoted project fee from the Client or otherwise agreed by Progress. The final 50% payment is to be made on completion of the website. We will not refund a deposit after 14 days of work commencing. The website will be switched to Live Mode once the Clients remaining balance is paid in full.

#### **40.18 INTEREST ON LATE COMMERCIAL PAYMENTS**

The late payment fee will be levied on the final invoice which is paid after 30 days from the date of issue of the respective invoice. The interest you can charge if another business is late paying for goods or a service is 'statutory interest' - this is 8% plus the Bank of England base rate for business to business transactions. You can't claim statutory interest if there's a different rate of interest in a contract. You can't use a lower interest rate if you have a contract with public authorities. The current Bank of England base rate is 0.5%, so statutory interest for a recent debt would be 8.5%. Check the Bank of England base rate history.

#### **40.19 YOUR PRIVACY**



We do not share or sell any of your details with third party companies, without your express permission and we will only email you or contact you about work related matters.

#### **40.20 COMPLAINTS PROCEDURE**

40.20.1 Informal procedure: Anyone who experiences a problem with their web service provided by Progress should raise the matter directly using our email address [helpdesk@progresscomms.co.uk](mailto:helpdesk@progresscomms.co.uk) to do so, giving sufficient information to locate the material (such as an url) and clearly outlining the grounds for complaint. The Company will approach the individual responsible for the material in question with a view to resolving the matter to the satisfaction of the complainant.

40.20.2 Formal complaints procedure: The formal complaints procedure should only be used where the complainant feels that the nature of the complaint is too serious to be dealt with informally, or where a satisfactory conclusion has not been reached after following the informal procedure. A formal complaint should be made in writing to Progress, who will acknowledge receipt and ensure that the matter is looked into as soon as possible. An initial response to any complaint can be expected within seven days of its receipt; a full and considered response to the complaint should be completed within 30 days and any subsequent remedy implemented with the minimum of delay.

#### **40.21 TERMINATION:**

40.21.1 We may terminate this agreement forth with if you fail to pay the amount due or any outstanding amounts due. We may terminate this agreement upon written notice if you breach any of these terms and conditions and you fail to correct the breach within seven (7) days following written notice from us specifying the breach, or if you are or your company goes into insolvent liquidation, or if you are a person you are declared bankrupt. On termination of the agreement we shall be entitled immediately to block your Web Site and to remove all data located on it. We will hold such data for a period of seven (7) days and allow you to collect it at your expense, failing which we shall be entitled to delete all such data. We shall further be entitled to post such notice in respect of the non-availability of your Web Site as we think fit. We may terminate or suspend any web site which is deemed to be causing a disruptive service to our Clients as a whole.

40.21.2 You may terminate your account with us if we cannot resolve any technical issues or problems concerning our services within a reasonable amount of time. You will receive a refund for the remainder of the contract term. However, we will not refund any used parts of the service.

#### **41.0 Our Employees**

**41.1** Our staff are always deemed as the most valuable asset of Progress. If the Customer or a third party were to engage or try to engage them without Progress's written agreement by a Board member, Progress would suffer serious loss. You as the Customer therefore hereby agree that you shall not engage or try to engage our staff or introduce them to any third party other than in good faith and without any view to their engagement by a third party.

**41.2** The Customer further agrees that if they engage or try to engage (or if a third party does so following introduction by the Customer) with any member or former member of Progress staff who has within the immediately preceding twelve (12) months been engaged in our provision of services for the same Customer, then the Customer shall pay Progress by way of liquidated damages such sum as represents 150% of the annual salary (or other annualised amount last payable by us) for the individual in question, to which both parties agree as a fair and reasonable estimate of the likely loss.

#### **42.0 Terms of Sales General**

The formation, construction and performance of all of the above Terms of Sale shall be governed in all respects by English Law.