

## TOP HEX LIMITED: CONDITIONS OF TRADING – HARDWARE AND SOFTWARE

### **1 Interpretation**

- 1.1 In these conditions unless the context otherwise requires:
- (A) 'this agreement' means the agreement between the parties constituted by the Buyer's acceptance of the Seller's quotation (which shall be deemed to incorporate these conditions)
  - (B) 'the Controller' means the printed circuit board controller, including both the hardware and the Software used in it, which the Seller will design and create for the Buyer
  - (C) 'intellectual property rights' means all rights available for the protection of any discovery, invention, name, design, process or works in which copyright or any rights in the nature of copyright subsist and all patents, copyrights, registered designs, design rights, circuit board topography, trade marks, service marks and other forms of protection from time to time subsisting in relation to the same, including the right to apply for any such protection and trade secrets and other unpublished information;
  - (D) 'materials' means any notes, calculations, specifications, reports, designs, drawings, models, prototypes or any information in a computer-readable form;
  - (E) 'the Product' means the Controllers produced using the designs and Software created during the Project;
  - (F) 'the Project' means the design, development and creation of the Controller;
  - (G) 'the Software' means the software used by the Controller to perform its functions in accordance with the Buyer's requirements; and
  - (H) 'the Specification' means the specifications for the hardware and the Software for the Controller to be agreed between the parties in accordance with these conditions
- 1.2 Headings are inserted for convenience and shall not affect the construction of this agreement.
- 1.3 Words importing one gender include all other genders and words importing the singular include the plural and vice versa.
- 1.4 Where the Buyer is dealing with the Seller on behalf of or at the request of another ('the End User'), the Buyer contracts as agent for the End User and warrants that it has actual authority to do so. At the Seller's request the Buyer shall disclose to the Seller the identity of the End User. The Buyer shall communicate the End User's requirements to the Seller in a complete, accurate and timely manner.
- 1.5 For the purposes of the Contracts (Rights of Third Parties) Act 1999 and notwithstanding any other provision of this agreement this agreement is not intended to, and does not, give any person who is not a party to it any right to enforce any of its provisions.

### **2 Commencement, progress and completion of the Project**

- 2.1 The Seller and Buyer shall co-operate forthwith to create the Specification.
- 2.2 The parties shall consider and discuss the Specification with a view to reaching agreement upon a design for final development and production.
- 2.3 The Seller shall (if the Buyer so requires) produce and deliver a pre-production prototype of the Product for testing and evaluation to the Buyer within one month (or such other time as the parties may agree) of the agreement of the Specification pursuant to clause 2.2.
- 2.4 The Buyer shall notify the Seller of any discrepancies between the prototype produced under clause 2.3 and the design agreed pursuant to clause 2.2 and the Seller shall promptly alter the prototype to remedy the discrepancies and submit the modified prototype to the Buyer 21 days (or such other time as the parties may agree) after being notified of the discrepancies.
- 2.5 The Controller shall be deemed to be satisfactory to the Buyer if, a prototype or Product having been delivered, the Buyer does not notify the Seller of discrepancies within 14 days of first delivery.

### **3 Manufacture and sale of the Product**

- 3.1 Except as otherwise provided in these Conditions, the Buyer shall not purchase the Product from any third party and shall purchase the Product only from the Seller.
- 3.2 The terms applicable to every contract between the parties for the purchase and sale of the Product shall be the terms and conditions set out in the schedule below but in the event of any conflict between such terms and this agreement, this agreement shall prevail.
- 3.3 For 6 months after completion of the Project the price of the Product payable by the Buyer to the Seller shall be the price set out in the Seller's quotation. Thereafter, the Seller shall fix the price of the Product, provided that the Seller may only increase the price of the Product at intervals of 6 months on one month's prior written notice.
- 3.4 Unless otherwise agreed all the Product delivered shall conform to the prototype or Product delivered to the Buyer last before acceptance pursuant to clause 2.5.
- 3.5 If the Buyer wishes the Seller to make any change to the Product after acceptance the Buyer shall make a change request in writing to the Seller, specifying the change or changes it wishes to make. The Seller shall notify the Buyer of any revision of the price for the Product resulting from such change or changes and shall not be required to proceed with any change unless and until the Buyer has confirmed in writing its acceptance of such revised price. Thereafter clause 3.3 above shall apply but with effect from the date of such acceptance.

### **4 Termination**

- 4.1 Prior to agreement being made on the matters stipulated in clause 2.2, this agreement may be terminated by either party on 14 days written notice in the event that the parties fail in a reasonable time to reach agreement on any of the matters specified in clauses 2.1 or 2.2. In the event of termination pursuant to this clause 4.1 neither party shall have any liability to the other for loss or damage due to termination but any accrued rights for previous breaches of this agreement are unaffected.
- 4.2 Following agreement pursuant to clause 2.2 either party may terminate this agreement in the event that the other party commits any breach of this agreement and, if the breach is capable of being remedied fails within 30 days of written notice to remedy it. Any such termination shall be without prejudice to the accrued rights of the parties and to any provision to this agreement which is expressed to survive termination.

### **5 Intellectual property rights**

- 5.1 Each party shall remain the owner of all intellectual property rights it owns at the date of this agreement in any materials which it has created or the creation of which was undertaken by a third party which it commissioned to create those materials.
- 5.2 Where any new materials are created for the purpose of this agreement by either party then, save to the extent that such materials embody the intellectual property rights of the other party, all the intellectual property rights in, or appearing from, such new material shall belong to the party which creates them.
- 5.3 Each party hereby grants a licence to the other to use its intellectual property rights incorporated in or appearing from the materials referred to in clause 5.1 or 5.2 for the purposes of the performance of this agreement, but not otherwise. The other party agrees not to use any of these intellectual property rights except for the purposes of performing this agreement.
- 5.4 Upon termination of this agreement each party shall:
- (A) deliver up to the other party all materials provided by the other party together with any copies thereof which remain in its possession power or control, and shall erase all reference to the materials held on all its computer systems and other information retrieval systems; and
  - (B) within 7 days destroy any materials created for the purposes of this agreement which embody any of the intellectual property rights of the other party to this agreement.
- 5.5 If either party believes that any third party is infringing any intellectual property rights in the Product it shall notify the other party. If either party wishes to take action against any third party for infringement of any of that party's intellectual property rights in the Product it shall give notice to the other party.

## **6 Software**

6.1 Unless made the subject of a separate escrow arrangement, the Seller shall keep a copy of the Software written physically and/or digitally on suitable media ('Media') in its possession and shall:

- (A) ensure that at all material times the Media is in good condition and fit for the purpose of reproducing the Software; and
- (B) ensure that at all times the Media is prominently and indelibly marked with a statement that it is the property of the Seller.

The Seller shall not dispose of or part with possession of the Software.

6.2 The Seller may include within the software a program or function which disables the Controller at a specified date unless and until a code is entered. If the Seller does so, it will notify the Buyer of that fact and identify the relevant date. The Seller will not, however, inform the Buyer of the code unless and until payment for the Product has been received in full pursuant to paragraph 3 of the Seller's Conditions of Sale.

## **7 Mutual limitation of liability**

7.1 Neither party shall be liable to the other in respect of any indirect or consequential loss, including loss of anticipated profits, goodwill or reputation, howsoever caused.

7.2 Nothing in this clause 7 or elsewhere in this agreement shall exclude, restrict or limit the liability of either party for death or personal injury caused by that party's negligence or for fraud.

## **8 General**

8.1 This agreement is binding upon the parties and their respective successors and permitted assigns. Neither of the parties shall be entitled to assign this agreement or any of its rights and obligations under it without the consent of the other (which consent the other party may in its absolute discretion withhold). If a party sub-contracts any of its obligations under the principal contract to a third party, such sub-contracting shall not affect any of the provisions of this agreement or the obligations of that party, who shall remain liable subject to any remedies it may have against the sub-contractor.

8.2 No exercise or failure to exercise or delay in exercising any right, power or remedy vested either party under or pursuant to this agreement shall constitute a waiver by that party of that or any other right, power or remedy.

## **9 Notices**

9.1 Any notice to be given by either party to this agreement shall be in writing and shall be deemed duly served if delivered personally or by fax or by prepaid registered post (airmail in the case of an address for service outside the United Kingdom) to the addressee at the last known address or (as the case may be) the fax number of that party or at such other address (or fax number) as the party to be served may have notified (in accordance with the provisions of this clause) for the purposes of this agreement.

9.2 Any notice sent by fax shall be deemed served when transmitted and any notice served by prepaid registered post shall be deemed served 48 hours after posting to an address in the United Kingdom or 7 days after posting to an address outside the United Kingdom. In proving the service of any notice it will be sufficient to prove, in the case of a letter, that the letter was properly stamped, addressed and placed in the post, or delivered or left at the proper address if delivered personally and, in the case of a fax, that the fax transmission was duly made to the proper fax number.

## **10 Law and jurisdiction**

10.1 This agreement shall be governed by and construed in accordance with English law.

10.2 In relation to any legal action or proceedings to enforce this agreement or arising out of or in connection with this agreement each of the parties irrevocably submits to the exclusive jurisdiction of the courts of England.

## **SCHEDULE**

### **Conditions of Sale**

#### **1 Definitions**

- 1.1 'Conditions' means the terms and conditions of sale set out in this document and any special terms and conditions agreed in writing by the Seller.
- 1.2 'Delivery Date' means the date specified by the Seller when the Products are to be delivered.
- 1.3 'Price' means the price for the Products and is exclusive of carriage, packing, insurance and VAT.

#### **2 Conditions applicable**

- 2.1 These Conditions shall apply to all contracts for the sale of Products by the Seller to the Buyer to the exclusion of all other terms and conditions including any terms or conditions which the Buyer may purport to apply under any purchase order confirmation of order or similar document.
- 2.2 Any variation to these Conditions (including any special terms and conditions agreed between the parties) shall be inapplicable unless agreed in writing by the Seller.

#### **3 The Price and payment**

- 3.1 The Price shall be the Seller's quoted price subject to any variations made pursuant to the Seller's Conditions of Trading. The Price is exclusive of VAT which shall be due at the rate ruling on the date of the Seller's invoice.
- 3.2 The Seller may require part payment of the Price in advance of and/or (at any time) as a condition of undertaking any work for the Buyer.
- 3.3 Payment of the Price and VAT shall be due in full and without any deduction whatsoever within 30 days of the date of the invoice. Time for payment shall be of the essence. If payment is not made within this time the Seller will suspend the supply of all further goods and services to the Buyer until payment has been made.
- 3.4 Interest on overdue invoices shall accrue from the date when payment becomes due from day to day until the date of payment at a rate of 8% above Barclays Bank plc's base rate from time to time in force and shall accrue at such a rate after as well as before any judgment.

#### **4 Warranties and liability**

The Seller warrants that the Products will at the time of delivery correspond to the Specification and perform under normal operating conditions according to the Specification for a period of one year from the Delivery Date. The Buyer's remedy for breach of the foregoing warranty is limited to replacement of the faulty Products. All other warranties, conditions or terms relating to fitness for purpose, quality or condition of the Products and whether implied by statute or common law or otherwise are excluded.

#### **5 Delivery of the Products**

Delivery of the Products shall be made to the address specified by the Buyer on the Delivery Date. The Buyer shall make all arrangements necessary to take delivery of the Products whenever they are tendered for delivery.

#### **6 Acceptance of the Products**

- 6.1 The Buyer shall be deemed to have accepted Products 48 hours after delivery to the Buyer.
- 6.2 After acceptance the Buyer shall not be entitled to reject Products which are not in accordance with the contract.

#### **7 Title and risk**

- 7.1 Risk shall pass on delivery of the Products.
- 7.2 Title shall pass only when full payment for the Products has been made to the Seller and until that time the Buyer grants the Seller permission to enter any premises under the Buyer's control, with or without prior notice, at any time of day during the Seller's normal working hours, to recover possession of the Products.

#### **8 Remedies of Buyer**

- 8.1 Where the Buyer rejects any Products then the Buyer shall have no further rights whatever in respect of the supply to the Buyer of such Products or the failure by the Seller to supply Products which conform to the Specification.
- 8.2 Where the Buyer accepts or has been deemed to have accepted any Products then the Seller shall have no liability whatever to the Buyer in respect of those Products save for the limited warranty set out in condition 4 above.
- 8.3 The Seller shall not be liable to the Buyer for late delivery or short delivery of the Products.