

## eAWARE TERMS AND CONDITIONS

### 1. INTERPRETATION

1.1 The definitions and rules of interpretation in this clause apply in this agreement.

**Authorised Users:** those employees, agents and pupils of the Customer who are authorised by the Customer to use the Services.

**Business Day:** a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

**Commencement Date:** the commencement date specified on the Order Form.

**Confidential Information:** information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in clause 10.4.

**Customer:** the customer identified on the Order Form.

**Customer Data:** the data inputted by the Customer, Authorised Users, or the Supplier on the Customer's behalf for the purpose of using the Services or facilitating the Customer's use of the Services.

**eAWARE:** eaware Limited a company incorporated in England and Wales with Company Number 09503491 and registered office address at 5 McMillan Close, Saltwell Business Park, Low Fell, Tyne & Wear. NE9 5BF whose registered VAT number is 240439624.

**Initial Subscription Term:** 12 months from the Commencement Date.

**Normal Business Hours:** 9.00 am to 5.00 pm local UK time, each Business Day.

**Order Form:** the order form to which these terms are attached or, if the order is being placed online, the order form displayed on the screen linking to these terms.

**Personal Information:** Recorded information about an identifiable individual that may include his or her name, address, email address, phone number, race, nationality, ethnicity, origin, color, religious or political beliefs or associations, age, sexual orientation, marital status, family status, identifying number, code, symbol.

**Renewal Period:** the period described in clause 12.1.

**Services:** the subscription services provided by the Supplier to the Customer under this agreement via [www.eaware.co.uk](http://www.eaware.co.uk) as more particularly described in Schedule 1.

**Software:** the online software applications and e-learning content provided by the Supplier as part of the Services.

**Subscription Fees:** the subscription fees payable by the Customer to the Supplier for the User Subscriptions, as set out in the Order Form.

**Subscription Term:** has the meaning given in clause 12.1 (being the Initial Subscription Term together with any subsequent Renewal Periods).

**User Subscriptions:** the user subscriptions purchased by the Customer pursuant to clause 8.1 which entitle Authorised Users to access and use the Services in accordance with this agreement.

1.2 A person includes an individual, corporate or unincorporated body (whether or not having separate legal personality). Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.

1.3 A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

- 1.4 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.5 A reference to a statute or statutory provision is a reference to it as it is in force as at the date of this agreement. A reference to a statute or statutory provision shall include all subordinate legislation made as at the date of this agreement under that statute or statutory provision.
- 1.6 A reference to writing or written includes e-mail.

## **2. USER SUBSCRIPTIONS**

- 2.1 Subject to the Customer purchasing the User Subscriptions in accordance with clause 3.3 and clause 8.1, the restrictions set out in this clause 2 and the other terms and conditions of this agreement, the Supplier hereby grants to the Customer a non-exclusive, non-transferable right to permit the Authorised Users to use the Services during the Subscription Term solely for the Customer's internal educational and business operations.
- 2.2 In relation to the Authorised Users, the Customer undertakes that the maximum number of Authorised Users that it authorises to access and use the Services shall not exceed the number of User Subscriptions it has purchased from time to time.
- 2.3 The Customer shall not:
- (a) except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties:
    - (i) and except to the extent expressly permitted under this agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software (as applicable) in any form or media or by any means; or
    - (ii) attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
  - (b) access all or any part of the Services in order to build a product or service which competes with the Services; or
  - (c) use the Services to provide services to third parties; or
  - (d) subject to clause 19.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services available to any third party except the Authorised Users, or
  - (e) attempt to obtain, or assist third parties in obtaining, access to the Services, other than as provided under this clause 2.
- 2.4 The Customer shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and, in the event of any such unauthorised access or use, promptly notify the Supplier.
- 2.5 The rights provided under this clause 2 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

## **3. ADDITIONAL USER SUBSCRIPTIONS**

- 3.1 Subject to clause 3.2 and clause 3.3, the Customer may, from time to time during any Subscription Term, purchase additional User Subscriptions in excess of the number set out in the Order Form and the Supplier

shall grant access to the Services to such additional Authorised Users in accordance with the provisions of this agreement.

3.2 If the Customer wishes to purchase additional User Subscriptions, the Customer shall notify the Supplier in writing or by email. The Supplier shall evaluate such request for additional User Subscriptions and respond to the Customer with approval or rejection of the request.

3.3 If the Supplier approves the Customer's request to purchase additional User Subscriptions, the Customer shall, within 30 days of the date of the Supplier's invoice, pay to the Supplier the relevant fees for such additional User Subscriptions as set out in the Order Form and, if such additional User Subscriptions are purchased by the Customer part way through the Initial Subscription Term or any Renewal Period (as applicable), such fees shall be pro-rated for the remainder of the Initial Subscription Term or then current Renewal Period (as applicable).

#### **4. SERVICES**

4.1 The Supplier shall, during the Subscription Term, provide the Services to the Customer on and subject to the terms of this agreement.

4.2 The Supplier shall use commercially reasonable endeavours to make the Services available 24 hours a day, seven days a week, except for:

- (a) planned maintenance carried out during the maintenance window of 10.00 pm to 2.00 am UK time; and
- (b) unscheduled maintenance performed outside Normal Business Hours, provided that the Supplier has used reasonable endeavours to give the Customer at least 6 Normal Business Hours' notice in advance.

4.3 The Supplier will, as part of the Services, provide the Customer with reasonable telephone and email support during Normal Business Hours.

#### **5. CUSTOMER DATA**

5.1 The Supplier may use anonymised data and results recorded and produced by the Software (excluding any personal data within the meaning of the Data Protection Act 1998) for marketing, research, analysis and comparison purposes.

5.2 If the Supplier processes any personal data on the Customer's behalf when performing its obligations under this agreement, the parties record their intention that the Customer shall be the data controller and the Supplier shall be a data processor and in any such case:

- (a) the Customer acknowledges and agrees that the personal data may be transferred or stored outside the EEA or the country where the Customer and the Authorised Users are located in order to carry out the Services and the Supplier's other obligations under this agreement;
- (b) the Customer shall ensure that the Customer is entitled to transfer the relevant personal data to the Supplier so that the Supplier may lawfully use, process and transfer the personal data in accordance with this agreement on the Customer's behalf;
- (c) the Customer shall ensure that the relevant third parties have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable data protection legislation;
- (d) each party shall take appropriate technical and organisational measures against unauthorised or unlawful processing of the personal data or its accidental loss, destruction or damage.

- 5.3 The Supplier may use the Customer's email address(es) to send the Customer marketing information, updates and renewal information.
- 5.4 No Personal Information as defined above, is collected, recorded or stored on the Users of the assessments.

## **6. SUPPLIER'S OBLIGATIONS**

- 6.1 The Supplier undertakes that the Services will be performed with reasonable skill and care.
- 6.2 The undertaking at clause 6.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to the Supplier's instructions, or modification or alteration of the Services by any party other than the Supplier or the Supplier's duly authorised contractors or agents. If the Services do not conform with the foregoing undertaking, Supplier will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in clause 6.1. Notwithstanding the foregoing, the Supplier:
- (a) does not warrant that the Customer's use of the Services will be uninterrupted or error-free; or that the Services and/or the information obtained by the Customer through the Services will meet the Customer's requirements; and
  - (b) is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer acknowledges that the Services may be subject to limitations, delays and other problems inherent in the use of such communications facilities.

## **7. CUSTOMER'S OBLIGATIONS**

The Customer shall:

- (a) provide the Supplier with:
  - (i) all necessary co-operation in relation to this agreement; and
  - (ii) all necessary access to such information as may be required by the Supplier;in order to provide the Services, including but not limited to Customer Data, security access information and configuration services;
- (b) comply with all applicable laws and regulations with respect to its activities under this agreement;
- (c) ensure that the Authorised Users use the Services in accordance with the terms and conditions of this agreement and shall be responsible for any Authorised User's breach of this agreement;
- (d) ensure that its network and systems comply with the relevant specifications provided by the Supplier from time to time; and
- (e) be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to the Supplier's data centres, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's network connections or telecommunications links or caused by the internet.

## **8. CHARGES AND PAYMENT**

- 8.1 The Customer shall pay the Subscription Fees to the Supplier, annually in advance, for the User Subscriptions in accordance with this clause 8.

- 8.2 The Customer shall pay all invoices raised by the Supplier within 30 days of the date of the invoice, if the Supplier has not received payment within that 30 day period then, without prejudice to any other rights or remedies it might have:
- (a) the Supplier may, without liability to the Customer, disable the Customer's password, account and access to all or part of the Services and the Supplier shall be under no obligation to provide any or all of the Services while the invoice(s) concerned remain unpaid; and
  - (b) interest shall accrue on a daily basis on such due amounts at an annual rate equal to 4% over the then current base lending rate of the Supplier's bankers in the UK from time to time, commencing on the due date and continuing until fully paid, whether before or after judgment.
- 8.3 The Supplier shall be entitled to increase the Subscription Fees and the fees payable in respect of the additional User Subscriptions purchased pursuant to clause 3.3 at the start of each Renewal Period upon 90 days' prior notice to the Customer the Order Form shall be deemed to have been amended accordingly.

## **9. PROPRIETARY RIGHTS**

- 9.1 The Customer acknowledges and agrees that the Supplier and/or its licensors own all intellectual property rights in the Services. Except as expressly stated herein, this agreement does not grant the Customer any rights to, or in, patents, copyright, database right, trade secrets, trade names, trade marks (whether registered or unregistered), or any other rights or licences in respect of the Services.

## **10. CONFIDENTIALITY**

- 10.1 Each party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this agreement.
- 10.2 Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this agreement.
- 10.3 Neither party shall be responsible for any loss, destruction, alteration or disclosure of Confidential Information caused by any third party.
- 10.4 The Customer acknowledges that details of the Services, and the results of any performance tests of the Services, constitute the Supplier's Confidential Information.
- 10.5 The Customer shall not make, or permit any person to make, any public announcement concerning this agreement without the prior written consent of the Supplier (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.
- 10.6 The above provisions of this clause 10 shall survive termination of this agreement, however arising.

## **11. LIMITATION OF LIABILITY**

- 11.1 This clause 11 sets out the entire financial liability of the Supplier (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer:
- (a) arising under or in connection with this agreement;
  - (b) in respect of any use made by the Customer of the Services or any part of them; and

- (c) in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with this agreement.

11.2 Except as expressly and specifically provided in this agreement:

- (a) the Customer assumes sole responsibility for results obtained from the use of the Services by the Customer, and for conclusions drawn from such use. The Supplier shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to the Supplier by the Customer in connection with the Services, or any actions taken by the Supplier at the Customer's direction;
- (b) all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this agreement; and
- (c) the Services are provided to the Customer on an "as is" basis.

11.3 Nothing in this agreement excludes the liability of the Supplier:

- (a) for death or personal injury caused by the Supplier's negligence; or
- (b) for fraud or fraudulent misrepresentation.

11.4 Subject to clause 11.2 and clause 11.3:

- (a) the Supplier shall not be liable whether in tort (including for breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this agreement; and
- (b) the Supplier's total aggregate liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this agreement shall be limited to the total Subscription Fees paid for the User Subscriptions during the 12 months immediately preceding the date on which the claim arose.

## 12. TERM AND TERMINATION

12.1 This agreement shall, unless otherwise terminated as provided in this clause 12, commence on the Commencement Date and shall continue for the Initial Subscription Term and, thereafter, this agreement shall be automatically renewed for successive periods of 12 months (each a **Renewal Period**), unless:

- (a) either party notifies the other party of termination, in writing, at least 30 days before the end of the Initial Subscription Term or any Renewal Period, in which case this agreement shall terminate upon the expiry of the applicable Initial Subscription Term or Renewal Period; or
- (b) otherwise terminated in accordance with the provisions of this agreement;

and the Initial Subscription Term together with any subsequent Renewal Periods shall constitute the **Subscription Term**.

12.2 Without affecting any other right or remedy available to it, either party may terminate this agreement with immediate effect by giving written notice to the other party if:

- (a) the other party fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 21 days after being notified in writing to make such payment;

- (b) the other party commits a material breach of any other term of this agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 21 days after being notified in writing to do so.

12.3 On termination of this agreement for any reason:

- (a) all licences granted under this agreement shall immediately terminate;
- (b) each party shall return and make no further use of any equipment, property and other items (and all copies of them) belonging to the other party;
- (c) the Supplier may destroy or otherwise dispose of any of the Customer Data in its possession unless the Supplier receives, no later than ten days after the date of the termination of this agreement, a written request for the delivery to the Customer of the then most recent back-up of the Customer Data. The Supplier shall use reasonable commercial endeavours to deliver the back-up to the Customer within 30 days of its receipt of such a written request, provided that the Customer has, at that time, paid all fees and charges outstanding at and resulting from termination (whether or not due at the date of termination). The Customer shall pay all reasonable expenses incurred by the Supplier in returning or disposing of Customer Data; and
- (d) any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination shall not be affected or prejudiced.

**13. FORCE MAJEURE**

The Supplier shall have no liability to the Customer under this agreement if it is prevented from or delayed in performing its obligations under this agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the Supplier or any other party), failure of a utility service or transport or telecommunications network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Customer is notified of such an event and its expected duration.

**14. VARIATION**

No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

**15. WAIVER**

No failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

**16. RIGHTS AND REMEDIES**

Except as expressly provided in this agreement, the rights and remedies provided under this agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

**17. SEVERANCE**

17.1 If any provision (or part of a provision) of this agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

17.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

**18. ENTIRE AGREEMENT**

18.1 This agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

18.2 Each of the parties acknowledges and agrees that in entering into this agreement it does not rely on 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 subject matter of this agreement, other than as expressly set out in this agreement.

**19. ASSIGNMENT**

19.1 The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

19.2 The Supplier may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

**20. THIRD PARTY RIGHTS**

This agreement does not confer any rights on any person or party (other than the parties to this agreement and, where applicable, their successors and permitted assigns) pursuant to the Contracts (Rights of Third Parties) Act 1999.

**21. NOTICES**

21.1 Any notice required to be given under this agreement shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other party at its address set out in this agreement, or such other address as may have been notified by that party for such purposes.

21.2 A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first business day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post.

**22. GOVERNING LAW**

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

**23. JURISDICTION**

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

**Schedule 1**

## Services

The Services comprise a combination (which will vary from time to time) of online assessments, video and audio clips, news articles, websites and worksheets (the **Content**).

The Content will be selected by eAWARE and be made available to the Customer via the Website to use as a teaching resource. The Content is generally designed to work with the National Curriculum and/or other curricula set by the Government, the Department for Education and/or any Government agencies with responsibility for the National Curriculum where practicable to do so, is generally categorised into modules that support the same and eAWARE will use reasonable endeavours to link and cross-reference the content to the relevant attainment targets. For the purposes of this clause 4, "National Curriculum" shall mean the curriculum that sets out the statutory entitlement to learning for all pupils, determines the content of what will be taught, sets attainment targets for learning as updated from time to time.

As part of the Services, eAWARE will provide documentation detailing instructions for use of the Services and may also provide from time to time certain other supporting documentation (the "**Documentation**").

eAWARE will use reasonable endeavours to provide regular updates to the Content ("**Updates**") and eAWARE reserves the right to remove, modify or amend certain parts of the Content. If the Customer does not receive any Update it is the Customer's responsibility to promptly inform eAWARE and eAWARE shall have no liability to Customer for any failure to provide Updates where it is not so informed. Where eAWARE is so informed, it shall then use its reasonable commercial endeavours to rectify any problem that is eAWARE's responsibility and within its control and shall use its reasonable endeavours to then provide such Update to the Customer.