

Workshop 1: Contracts - should I have one & are they fit for purpose?

Charlotte Peel

Commercial Disputes Lawyer

Example

Background:

ABC Buyer Ltd (“**ABC**”) = The Buyer/Purchaser

Supplier Services Ltd (“**SS**”) = The Supplier

ABC needs IT support and maintenance on its IT system for 1 year

SS can offer these services for 1 year at a cost of £500k plus VAT

ABC sends SS a Purchase Order and a copy of its General T&C's

SS commences work on 14.03.19

THE PO

Number: _____

Bill To: Ship To:

Raised By: _____ Date Raised: _____

Authorized: No Date Authorized: _____ Credit Terms: 30 days

Attention Of: _____ Date Required: _____ Courier: _____

Supplier: Supplier Services Ltd

Phone: _____

Fax: _____

Contact: _____

Comments:

Quantity	Product	Note	Unit Price	Gross	Discount	Potential Revenue
1	Misc	Year 1 Annual Support Fee	£500,000			
					Sub Total	£500,000
					Discount	
					Shipping	
					Tax	
					Total	£600,000

Authorized Signature: **Mr ABC** Date: 13.03.19

"Any Services or Works provided by the Supplier to ABC Buyer Ltd under this order shall always be subject to ABC Buyer Ltd's General Terms and Conditions ("T's & C's"), attached. Any terms subsequently provided by the Supplier will not supersede these (T's & C's). No terms of the Supplier shall supersede these T's & C's unless agreed and signed in writing by ABC Buyer LTD."

1. INTERPRETATION

1.1 In these conditions:

BUYER means ABC Buyer

SELLER means the person to whom the Purchase Order is addressed.
 GOODS means the goods (including any instalment of the goods or any parts of them and all relating documentation) which the Seller is to supply in accordance with these Conditions including goods supplied as part of a Service.
 SERVICE means the service(s) (including any parts of the service) which the Seller is to supply in accordance with these Conditions.
 WRITING includes faxes and any non-transitory form of visible reproduction of words (and email) but not text messaging via a mobile phone.
 PURCHASE ORDER means a document issued by the Buyer to the Seller which constitutes the exclusive statement of the Buyer's offer to seller to purchase Goods and/or Services.
 INCOTERMS means the International rules for the interpretation of trade terms of the International Chamber of Commerce as in force at the date when the Purchase Order is issued. Unless the context otherwise requires any terms or expression which is defined in or given a particular meaning by the provisions of Incoterms shall have the same meaning in these Conditions, but if there is any conflict between the provisions of Incoterms and these Conditions the latter shall prevail.

1.2 Any reference in these Conditions to any provision of a statute shall be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.

2. TERMS

2.1 This Purchase Order constitutes the exclusive statement of the Buyer's offer to Seller to purchase the Goods and/or Services subject to these terms and conditions (Hereinafter referred to as "these Conditions").
 2.2 These Conditions shall apply to this Purchase Order to the exclusion of any additional or different terms and conditions stated by Seller in any quotation, confirmation of order, specification or other document. These Conditions are superseded by terms and conditions agreed between Buyer and Seller in Buyer's Raw Materials Supplier Compliance Guide, or Buyer's Finished Goods Supplier Compliance Guide if signed between Buyer and Seller.
 2.3 Acceptance of this Purchase Order by Seller is strictly conditioned on acceptance of these Conditions.
 2.4 This Purchase Order shall be deemed to be accepted on the earlier of (i) by a written confirmation or acceptance issued and executed by the Seller's authorised representative; or (ii) by the Seller providing the Goods and/or Services.

3. DELIVERY AND INSPECTION

3.1 Time and date of deliveries are of the essence in this Purchase Order.
 3.2 The Seller shall be responsible to the Buyer for ensuring the accuracy of the terms of any order submitted by the Buyer, so far as the quantity, quality, description of, delivery date and any specification shall be those set out in the Seller's order acknowledgement.
 3.3 The Buyer reserves the right to make final inspection of the Goods upon receipt (notwithstanding any prior payment or acceptance of the Goods thereof) and, in addition to any other right and remedies available under law, to cancel the order and reject the Goods upon any default by the Seller in meeting or satisfying the terms of the Purchase Order including but not limited to quantity, quality, delivery dates or specifications.
 3.4 The Seller shall be liable to the Buyer for any and all losses, costs and expenses sustained as a result of the Seller's failure to perform.
 3.5 If the Seller fails to deliver Goods or perform Services in accordance with the stated time for delivery, the Seller shall pay the Buyer on demand or the Buyer may deduct from its payments to the Seller 1% of the price payable for such Goods or Services for each week's delay, up to a maximum of 10% as liquidated damages. The parties confirm that these sums represent a genuine pre-estimate of the Buyer's loss.
 3.6 The Seller shall not be allowed additional time outside of the time stated for delivery without the express written consent of the Buyer.
 3.7 Unless otherwise specified on the Purchase Order, all Goods shall be delivered DDP.
 3.8 Risk of loss shall pass to the Buyer upon delivery of the Goods in an undamaged condition.
 3.9 The Seller shall bear all risks and expenses for returning any rejected Goods or Goods requiring correction after notice of rejection including, but not limited to storage, freight, insurance, packing, materials and labour.
 3.10 Delivery of the Goods must equal exact amounts ordered unless otherwise agreed in Writing by the Buyer. If the Goods are delivered to Buyer in excess of the quantities ordered, the Buyer shall not be bound to pay for the excess and any excess shall be and shall remain at the Seller's risk and shall be returnable at the Seller's expense.
 3.11 On delivery, the Seller (or its appointed carrier) shall provide the Buyer with (i) such export or import licences and consents and documents as are required; (ii) certificates of origin as the Buyer may reasonably request; (iii) such other certificates or documentation as are specified on the Purchase Order; and (iv) a delivery note.

4. PACKING AND SHIPMENT

The Buyer may agree in writing to delivery FCA or other delivery terms. In such circumstances:

4.1 The Seller shall be responsible for ensuring that the Goods are shipped in accordance with the Buyer's instructions and that (i) each container is marked with the Buyer's Purchase Order number and (ii) shipped with a packing note stating the Purchase Order number.
 4.2 The Seller shall not use a shipping method that is different to the Buyer's instructions without the prior written authorisation of the Buyer.
 4.3 All prepaid transportation charges must be advised by the Seller to the Buyer at the time of quotation. Any carriage charges will be paid by the Buyer as specified on the Purchase Order; and be accompanied by the original freight bill or a copy of the bill of lading.
 4.4 The Seller shall be liable to the Buyer for prepaid transportation costs, where prepaid transportation costs are authorised and the Seller does not ship against the specified account.

5. TERMS OF PAYMENT

5.1 The Seller shall be entitled to raise an invoice upon delivery of the Goods and/or Services to the Buyer.
 5.2 Unless otherwise agreed to in Writing by the Buyer, payment shall be made to the Seller after receipt of the Seller's invoice and all Goods and/or Services including all documentation as requested on the Purchase Order, on terms of end of month plus sixty (60) days provided that payment (i) shall not constitute acceptance of the Goods and/or Services; or (ii) impair the Buyer's right to inspection.
 5.3 All applicable taxes, charges and transportation costs must be stated separately on the Seller's invoice.
 5.4 Without prejudice to any other right or remedy, the Buyer reserves the right to set off any amount owing at any time from the Seller to the Buyer against any amount payable by the Buyer to the Seller.
 5.5 If the Seller (i) delivers less than 90% of the quantity of Goods ordered, the Buyer may reject the Goods; or (ii) delivers more than 110% of the quantity of Goods ordered, the Buyer may at its discretion reject the Goods or the excess Goods, and any rejected Goods shall be returnable at the Seller's risk and expense. If the Seller delivers more or less than the quantity of Goods ordered, and the Buyer accepts the delivery, a pro rata adjustment shall be made to the invoice for the Goods.

6. PRICES

6.1 The price for the Goods and/or Services ordered shall be as stated on the Purchase Order.
 6.2 Any price increase must be approved in Writing by the Buyer prior to the shipment of Goods and/or performance of the Service.
 6.3 The Buyer shall not be bound to any price increase which has not been expressly agreed to in Writing by the Buyer.
 6.4 The Seller warrants that the prices charged to the Buyer are no higher than prices charged on orders for similar Goods and/or Services to third parties for similar quantities. In the event that the Seller breaches this warranty, the prices of the Goods and/or Services shall be reduced accordingly, retrospectively to the date of the breach.

7. TITLE TO GOODS

7.1 The title to all the Goods purchased hereunder shall pass directly to the Buyer from the Seller at the point of delivery.

8. WARRANTIES AND LIABILITIES

8.1 The Seller warrants that for a period of no less than one (1) year after acceptance by the Buyer that the Goods covered by this Purchase Order shall be: (i) in full conformity with all specifications, drawings and/or other descriptions or samples, whether given or approved by the Seller or the Buyer (ii) merchantable and/ or of satisfactory quality (iii) fit for their intended purpose (iv) free from defects in design, materials and workmanship (v) in full compliance with all applicable statutory and regulatory requirements relating to their manufacture, labelling, packaging, storage, handling, shipment and delivery (vi) and do not infringe any patents, trademarks, copyrights or other intellectual property rights.

8.2 The Seller warrants that the Service(s) covered by this Purchase Order will be performed in accordance with best practice in the Seller's industry, profession or trade.

8.3 Such warranties in section 8.1 and 8.2 shall (i) be in addition to any other warranties implied or expressly given by the Seller, (ii) survive inspection, delivery, acceptance of and payment for the Goods and/or Services and (iii) extend to the Buyer, its successors, assigns and customers.

8.4 The Seller shall ensure that at all times it has and maintains all the licences, permissions, authorisations, consents and permits that it needs to carry out its obligations under the Purchase Order.

8.5 The Buyer shall have the right to inspect and test the Goods at any time before or after delivery.

8.6 If following such inspection or testing the Buyer considers that the Goods do not conform or are unlikely to comply with the Seller's undertakings at section 8.1, the Buyer shall inform the Seller and the Seller shall immediately take such remedial action as is necessary to ensure compliance.

8.7 Notwithstanding any such inspection or testing, the Seller shall remain fully responsible for the Goods and any such inspection or testing shall not reduce or otherwise affect the Seller's obligations under the Purchase Order, and the Buyer shall have the right to conduct further inspections and tests after the Seller has carried out its remedial actions.

8.8 The Buyer may, at its option, either return for full credit or require prompt correction or replacement of defective or non-conforming Goods or parts thereof, or re-performance of the defective or non-conforming Services, which rights shall be in addition to such other rights the Buyer may have under applicable law.

8.9 Any Goods so replaced or repaired or Services re-performed will be subject to the same warranties outlined in sections 8.1 and 8.2.

8.10 If the Seller shall fail to repair or replace such defective Goods, or fail to re-perform defective Services, the Buyer has the right to have the work of repair or replacement or re-performance undertaken by a third party and recover the costs incurred from the Seller.

8.11 In the event that the Buyer brings a claim against the Seller to enforce performance of any section written under these Conditions, or should the Buyer be forced to defend a claim brought against it by the Seller, the Seller shall be liable for all costs and expenses incurred, including but not limited to legal fees.

9. INDEMNIFICATION

9.1 The Seller shall indemnify and hold harmless the Buyer, its successors and assigns and their respective officers, directors, employees, agents and customers from all claims, demands, liabilities, costs and expenses (including legal fees) arising from any actual or alleged:

9.1.1 defect in the Goods and/or Services provided by the Seller hereunder;

9.1.2 failure of the Goods and/or Services to comply with all specifications;

9.1.3 failure of the Goods and/or Services to comply with the express or implied warranties of the Seller;

9.1.4 failure of the Goods and/or Services to comply with all applicable laws, rules and regulations;

9.1.5 bodily injury or death, direct or indirect damage to property or any loss of use of any tangible or intangible property (including loss of business profits) caused by the Goods and/or Services and/or the Seller's negligence;

9.1.6 infringement of any patents, trademarks, copyrights or other intellectual property rights;

9.1.7 failure by the Seller to provide import or export documents, certificates of origin or other certificates required or the provision of false or inaccurate documents or certificates;

9.1.8 Goods and/or Services supplied that do not conform with any export or import documents, certificate of origin or other certificates supplied by the Seller in relation to those Goods and/or Services; or

9.1.10 any breach by the Seller of these Conditions.

9.2 The indemnification and hold harmless obligations of this section shall survive delivery of the Goods and/or Services supplied under this Purchase Order.

10. BUYER'S PROPERTY

10.1 The Seller acknowledges that all and any materials, equipment and tools, drawings, specifications, and data supplied by the Buyer to the Seller (**Buyer Materials**) and all intellectual property rights in the Buyer Materials are and shall remain the exclusive property of the Buyer. The Seller shall keep the Buyer Materials in safe custody at its own risk, maintain them in good condition until returned to the Buyer, and not dispose or use the same other than in accordance with the Buyer's written instructions or authorisation.

10.2 All trademarks of the Buyer that the Buyer requests the Seller to affix to the Goods purchased hereunder are owned by the Buyer and the Seller shall not acquire or claim any right, title or interest therein, or use any such trademarks for any other purpose.

11. CONFIDENTIALITY

11.1 Any drawings, data, tools, designs, specifications, equipment, software programs or other property supplied by the Buyer to the Seller shall, in connection with this Purchase Order remain the property of the Buyer and such information shall be kept confidential.

11.2 Such property shall (i) be used exclusively in connection with the Goods and/or Services ordered hereunder, (ii) maintained in first class condition and (iii) returned by the Seller to the Buyer on termination of the contract; or earlier if the Buyer should so request.

11.3 The Seller shall not make any news release or public announcement regarding a contract of purchase or business relationship with the Buyer without the prior written consent of the Buyer.

12. INSURANCE

12.1 The Seller shall maintain in force, with a reputable insurance company, comprehensive professional indemnity insurance, product liability insurance and public liability insurance to cover the liabilities that may arise under or in connection with the Purchase Order or the Seller's obligations under it or these Conditions, but the maintenance of such insurance shall not in any way limit the liability of the Seller.

12.3 Where performance of the contract requires entry on to any premises or facilities of the Buyer, or involves the use or operation of property furnished by the Buyer, the Seller shall also obtain and maintain property damage insurance to an amount sufficient to cover any loss.

12.4 Upon the request of the Buyer, the Seller shall produce both the insurance certificate giving details of cover and the receipt for the current year's premium in respect of each insurance policy.

12.5 All insurance shall be primary and non-contributory.

13. TERMINATION

13.1 The Buyer may terminate this Purchase Order in whole or in part at any time upon the Buyer's written notice to the Seller (i) for any reason at the Buyer's convenience, (ii) for any default by the Seller hereunder (including but not limited to the Seller's failure to deliver Goods and/or Services within the time specified by the Buyer), (iii) in the event that the Seller becomes the subject of any claim or court proceeding or ruling for the relief of debtors or otherwise becomes insolvent or bankrupt or makes an assignment for the benefit of its creditors.

13.2 In the event of termination, the Buyer may further notify the Seller that all right, title and interest in and to all of any portion of material acquired by the Seller and paid for by the Buyer for the performance of this Purchase Order, work in progress and/or completed items specified in such notice shall pass immediately to the Buyer.

13.3 The Buyer shall have no liability to the Seller for Goods (whether finished or unfinished) that are readily useable, reusable or saleable.

13.4 In the event of termination under section 13.1(ii) or (iii), the Buyer may purchase similar Goods and/or Services elsewhere or secure the manufacture and delivery of Goods and/or performance of Services by contract or otherwise, and the Seller shall be liable for any excess cost incurred by the Buyer.

13.5 Termination of this Purchase Order, however arising, shall not affect any of the parties' rights and remedies that have accrued as at termination.

13.6 Clauses which expressly or by implication survive termination shall continue in full force and effect.

14. TOOLING

14.1 Where the Buyer has agreed to make a contribution towards the Seller's costs in relation to tooling required to manufacture the Goods, the Seller agrees that as a condition of that contribution it shall not use that tooling other than in relation to production of the Goods to be provided to the Buyer, unless and until it has been expressly agreed to in Writing by the Buyer.

15. INTELLECTUAL PROPERTY

15.1 Where the Buyer appoints the Seller to provide Goods or Services embodying the Buyer's intellectual property, the Buyer grants the Seller an exclusive royalty-free licence to use the Buyer's intellectual property for the purpose only of providing the Goods or Services.

15.2 All existing and future rights, titles and interests in any and all inventions or discoveries arising, or to arise from such Goods or Services shall vest in the Buyer to the fullest extent permissible by law. The Seller fully and irrevocably assigns to the Buyer, with full title guarantee and free from all third party rights, the intellectual property rights and all other rights, titles and interests in all works written, drawn or otherwise recorded, originated, conceived or made by the Seller in connection with the Goods or Services (the "Works") including all documents, products and materials developed by the Seller or its agents, subcontractors, consultants and employees in relation to the Goods or Services in any form, including computer programs, data, reports and specifications (including drafts).

15.3 Insofar as they do not so vest automatically by operation of law or under these Conditions, the Seller holds legal title in such intellectual property rights and all other rights, titles and interests in all such Works on trust for the Buyer. As and when requested by the Buyer the Seller will execute such assignment/transfer documents as the Buyer requires in order to transfer legal title to the Buyer and to record such transferred title at any relevant official intellectual property office.

15.4 The Seller waives any moral rights to which it is now or may at any future time be entitled in any of the Works, and shall obtain waivers of any moral rights in any and all such Works to which any individual is now or may at any future time be entitled, under Chapter IV of the Copyright and Designs and Patents Act 1988 or any similar provision of law in any jurisdiction.

16. AMENDMENTS

16.1 The Buyer shall have the right at any time by giving notice in Writing to Seller, to make changes in any one or more of the following:

16.1.1 quantity;

16.1.2 method of shipping or packing;

16.1.3 drawings, designs or specifications;

16.1.4 place of delivery; and/or

16.1.5 delivery schedule.

If any such changes cause an increase or decrease in the cost of or the time required for the performance of the work, an equitable adjustment shall be agreed in Writing by the parties to the price and/or delivery schedule and the Purchase Order shall be amended accordingly. No such adjustment shall take effect unless and until it has been expressly agreed to in Writing by the Buyer.

17. VARIATION

17.1 Except as set out in these Conditions, any variation to these Conditions and/or the contract between the parties, including the introduction of any additional terms and conditions, shall only be binding when expressly agreed to in Writing by the Buyer.

18. HEALTH AND SAFETY

18.1 When on the Buyer's premises or the Buyer's customer premises, the Seller shall comply with the Buyer's policies outlined in the Buyer's most current edition of H&B HEALTH AND SAFETY MANUAL which shall be provided to the Seller upon request.

19. ANTI-BRIBERY AND ANTI-CORRUPTION

19.1 The Seller, its subsidiaries and affiliates, and all their respective directors, officers, employees and authorised agents and any other person associated with or acting on behalf of the Seller shall:

19.1.1 comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 and the U.S. Foreign Corrupt Practices Act 1977 (**Relevant Requirements**);

19.1.2 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK or otherwise with the Relevant Requirements;

19.1.3 comply with the Buyer's Anti-bribery and Anti-corruption Policies (a copy of which will be provided to Seller upon request), as the Buyer may update them from time to time (**Relevant Policies**);

19.1.4 have and shall maintain in place throughout the term of this agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Relevant Requirements, the Relevant Policies and clause 19.1.2, and will enforce them where appropriate;

19.1.5 promptly report to the Buyer any request or demand for any undue financial or other advantage of any kind received by the Seller in connection with the performance of the Purchase Order; and

19.1.6 immediately notify the Buyer (in Writing) if a foreign public official becomes an officer or employee of the Seller or acquires a direct or indirect interest in the Seller and the Seller warrants that it has no foreign public officials as direct or indirect owners, officers or employees at the date of this Purchase Order).

19.2 The Seller shall ensure that any person associated with the Seller who is performing services or providing goods or services in connection with this Purchase Order does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Seller in this Section 19 (**Relevant Terms**). The Seller shall be responsible for the observance and performance by such persons of the Relevant Terms, and shall be directly liable to the Buyer for any breach by such persons of any of the Relevant Terms.

20. COMPLIANCE WITH ANTI-SLAVERY AND HUMAN TRAFFICKING LAWS AND POLICIES

In performing its obligations under the agreement, the Seller shall:

20.1 comply with all applicable anti-slavery and human trafficking laws, statutes and regulations and codes from time to time in force including but not limited to the Modern Slavery Act 2015; and

20.2 have and maintain throughout the term of this agreement its own policies and procedures to ensure its compliance; and

20.3 not engage in any activity, practice or conduct that would constitute an offence under sections 1, 2 or 4, of the Modern Slavery Act 2015; and

20.4 include in its contracts with its subcontractors and suppliers anti-slavery and human trafficking provisions that are at least as onerous as those set out in this subparagraph to ensure that each of its subcontractors and suppliers shall comply with all applicable anti-slavery and human trafficking laws, statutes, regulations and codes from time to time in force including but not limited to the Modern Slavery Act 2015.

20.4 The Seller shall indemnify The Buyer against any losses, liabilities, damages, costs (including but not limited to legal fees) and expenses incurred by The Buyer or awarded against The Buyer as a result of any breach of Anti-slavery Act.

21. DUE DILIGENCE

The Seller represents and warrants that:

21.1 neither the Seller nor any of its officers, employees or other persons associated with it: (i) has been convicted of any offence involving slavery and human trafficking; and (ii) has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of or in connection with slavery and human trafficking.

21.2 the Seller shall implement due diligence procedures for its subcontractors and suppliers and other participants in its supply chains, to ensure that there is no slavery or human trafficking in its supply chains.

22. REPORTS

22.1 The Seller shall notify the Buyer as soon as it becomes aware of any actual or suspected slavery or human trafficking in a supply chain which has a connection with this agreement.

22.2 The Seller shall prepare and deliver to the Buyer on request a report setting out the steps it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its business.

23. ANTI-FACILITATION OF TAX EVASION

23.1 The Seller shall

23.1.1 not engage in any activity, practice or conduct which would constitute either: (i) a UK tax evasion facilitation offence under section 45(5) of the Criminal Finances Act 2017; or (ii) a foreign tax evasion facilitation offence under section 46(6) of the Criminal Finances Act 2017;

23.1.2 have and shall maintain in place throughout the term of this agreement such policies and procedures as are both reasonable to prevent the facilitation of tax evasion by another person (including without limitation employees of the Seller) and to ensure compliance with 23.1.1 above;

23.1.3 promptly report to the Seller any request or demand from a third party to facilitate the evasion of tax within the meaning of Part 3 of the Criminal Finances Act 2017;

23.1.4 provide the Buyer with such supporting evidence of compliance with this subparagraph as the Buyer may reasonably request.

23.2 The Seller shall ensure that any person associated with the Seller who is performing services and providing goods in connection with this agreement does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Seller in 23.1 (**Anti-facilitation Terms**). The Seller shall be responsible for the observance and performance by such persons of the Anti-facilitation Terms, and shall be directly liable to the Buyer for any breach by such persons of any of the Anti-facilitation Terms.

23.3 Breach of 23.1 and / or 23.2 shall be deemed a material breach of these Conditions.

23.4 For the purposes of Condition 23 the meaning of reasonable prevention procedure shall be determined in accordance with any guidance issued under section 47 of the Criminal Finances Act 2017 and a person associated with the Seller includes but is not limited to any subcontractor of the Seller.

24. INTERNATIONAL PROVISIONS

24.1 Unless otherwise agreed with the Buyer in Writing in advance, when delivering Products to the Buyer from outside the UK, the Seller must be the importer of record for the purpose of all regulatory requirements of the UK Customs and Border Protection Agency or any other UK governmental authority having jurisdiction over UK imports and must maintain records relating to such international transactions for a period of five years.

24.2 The Seller acknowledges that the Buyer is unable to accept Products or Services purchased or provided from any country subject to US, EU, Canadian or UK sanctions or Products or Services which are subject to US export control laws or regulations and will ensure that none of the Products or Services originate from any of these countries or are subject to such laws or regulations.

24.3 The United Nations Convention on the International Sale of Goods shall not apply to these Conditions.

25. WAIVER

25.1 Any failure or delay on the part of the Buyer to exercise any right, power or privilege hereunder shall not operate as a waiver thereof.

25.2 Any waiver by the Buyer of any breach of, or any default under, any provision of these Conditions shall not be deemed a waiver of any subsequent breach or default of the same or any other provision and shall in no way affect the other terms of these Conditions.

26. GOVERNING LAW

26.1 The rights and obligations of the parties hereunder shall be governed by and construed in all respects in accordance with the Laws of England and Wales

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

27. ASSIGNMENT

The Seller shall not be entitled to assign, subcontract, charge or otherwise deal with the Purchase Order or any part of it without the prior written consent of the Buyer (such consent is not to be unreasonably withheld or delayed). The Buyer may assign the Purchase Order or any part of it to any other party.

27 GENERAL

27.1 Each right or remedy of a party under these Conditions is without prejudice to any other right or remedy of that party whether under these Conditions or not.

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

27.3 Any notice required or permitted to be given by either party to the other under these Conditions shall be in Writing addressed to the other party or its Registered Office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice.

27.4 The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Purchase Order.

INVOICE TO
ABC Buyer Ltd

INVOICE NO. : 1
DATE 25/03/2019
DUE DATE 24/04/2019
TERMS 30 Days

PO NUMBER 1

DATE	ACTIVITY	QTY	RATE	VAT	AMOUNT
13/03/2019	Third Party Support and Maintenance Year 1	1	£500,000	20.0% S	£600,000

Third Party Support and Maintenance Year 1	SUBTOTAL	£500,000
	VAT TOTAL	£100,000
	TOTAL	£600,000
	BALANCE DUE	GBP £600,000

VAT SUMMARY

RATE	VAT	NET
VAT @ 20%	£100,000	£500,000

Is there a binding contract?

- Is there a binding contract? What are they key ingredients?
 - Offer
 - Acceptance
 - Consideration
 - Intention
 - Authority

Key contractual ingredients

Number: _____

Bill To: Ship To:

Raised By: _____ Date Raised: _____

Authorized: No Date Authorized: _____ Credit Terms: 30 days

Attention Of: _____ Date Required: _____ Courier: _____

Supplier: Supplier Services Ltd

Phone: _____

Fax: _____

Contact: _____

Comments:

			Discount	Potential Revenue
1	Misc	Year 1 Annual Support Fee	£500,000	

Sub Total

Discount _____

Shipping _____

Tax _____

Total £600,000

Authorized Signature: Date: 13.03.19

"Any Services or Works provided by the Supplier to ABC Buyer Ltd under this order shall always be subject to ABC Buyer Ltd's General Terms and Conditions ("T's & C's"), attached. Any terms subsequently provided by the Supplier will not supersede these (T's & C's). No terms of the Supplier shall supersede these T's & C's unless agreed and signed in writing by ABC Buyer LTD."

Acceptance?

- Actual acceptance – such as an email along the lines of:

13.03.19

“Dear Jenny

Thanks for sending your PO & Terms and Conditions. I confirm that we accept. I’ve attached the signed order

We will start providing the services on 14.03.19

Kind regards

Charlotte”

Acceptance?

- Implied acceptance
- *Actual vs Implied – Protect yourself if you can and obtain actual acceptance*
- *Include a protective clause within your T&C's:*

Clause 2.4 of the T&C's

*“This Purchase Order shall be deemed to be accepted on the earlier of (i) by a written confirmation or acceptance issued and executed by the Seller’s authorised representative; ii) **on the Commencement Date or** (iii) by the Seller providing the Goods and/or Services”.*

Do any other terms form part of the contract?

Do the T&C's form part of the contract?

"Any Services or Works provided by the Supplier to ABC Buyer Ltd under this order shall always be subject to ABC Buyer Ltd's General Terms and Conditions ("T's & C's"), attached. Any terms subsequently provided by the Supplier will not supersede these (T's & C's). No terms of the Supplier shall supersede these T's & C's unless agreed and signed in writing by ABC Buyer LTD."

Does the invoice form part of the contract?

Supplier Services Ltd Invoice

Tax Invoice

INVOICE TO
ABC Buyer Ltd

INVOICE NO. : 1
DATE 25/03/2019
DUE DATE 24/04/2019
TERMS 30 Days

Do any other terms form part of the contract?

- What about correspondence sent between the parties prior to the PO being sent? Consider the below email chain:

20.02.19
Dear Jenny

We would love to work with ABC Buyer!

We can provide a year's worth of support in the sum of £500,000 plus VAT. Our payment terms are strictly 14 days. Can you send a purchase order?

Kind regards

Charlotte

For and on behalf of Seller Services LTD

12.03.19
Dear Charlotte

Thanks for your email.

*Please see **attached** PO along with our purchase order. I'd be grateful if you could sign and return at your earliest convenience.*

Many thanks

Jenny

On behalf of ABC Buyer

Do any other terms form part of the contract?

- PO says:

“Any Services or Works provided by the Supplier to ABC Buyer Ltd under this order shall always be subject to ABC Buyer Ltd's General Terms and Conditions (“T’s & C’s”), attached. Any terms subsequently provided by the Supplier will not supersede these (T’s & C’s). No terms of the Supplier shall supersede these T’s & C’s unless agreed and signed in writing by ABC Buyer LTD.”

T&C’s say:

“These Conditions shall apply to this Purchase Order to the exclusion of any additional or different terms and conditions stated by Seller in any quotation, confirmation of order, specification or other document.”

Would be better if there was an entire agreement clause: *“The parties agree that the Contract, and any documents entered into pursuant to it, constitutes the entire agreement between them and supersedes all previous agreements, understandings and arrangements between them, whether in writing or oral in respect of its subject matter.*

Or label your pre-contractual emails – “SUBJECT TO CONTRACT”

Conflicting Terms

- What happens when there are conflicting terms within your contract?
- Consider Jenny's email below:

"Hi Jenny

We sent our invoice to you 30 days ago and payment has not yet been received as per the terms included within your PO – please can you remit payment asap?

Charlotte"

Conflicting Terms

- ABC's PO says "*Credit Terms 30 days*" in respect of payment
- ABC's T&C's say "*payment shall be made to the Seller after receipt of the Seller's invoice and all Goods and/or Services including all documentation as requested on the Purchase Order, on terms of end of month plus sixty (60) days*"
- Which payment terms prevail?
- Could potentially be a big impact if you get this wrong – check that your PO says what you want it to say!

Conflicting Terms

- Also a risk where conflicting terms, that T&C's could be deemed null and void
- Save your T&C's by including a severance clause such as:
- *“If any provision or part-provision of this agreement is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of this agreement.”*

Variation of terms post contract

13.04.19

Dear Charlotte

Thanks for your email. We are manic here at the moment, drowning is the adjective which comes to mind!

No problem .

Many thanks

Jenny

On behalf of ABC Buyer LTD

12.04.19

Dear Jenny

How are you? Hope everything is good?

I **attach** our invoice for your consideration.

You will note our payment terms are 30 days upon receipt of invoice.

Look forward to receiving payment by then.

Kind regards

Charlotte

On behalf of Supplier Services

Variation of terms post contract

- PO expressly states:

“Any Services or Works provided by the Supplier to ABC Buyer Ltd under this order shall always be subject to ABC Buyer Ltd's General Terms and Conditions (“T’s & C’s”), attached. Any terms subsequently provided by the Supplier will not supersede these (T’s & C’s). No terms of the Supplier shall supersede these T’s & C’s unless agreed and signed in writing by ABC Buyer LTD .”

- Whilst ABC have agreed to SS’s varied terms re payment in email, ABC could try & rely on their PO and say they didn’t “sign in writing” the variation & therefore not binding
- Difficulty with this is that T&C’s define “in writing” as: *“includes faxes and any non-transitory form of visible reproduction of words (and email) but not text messaging via a mobile phone”*
- Jenny’s signature in writing is likely to be an agreement of the variation
- T&C’s also deal with variation & allow variation in writing
- ADVICE: Include a provision within PO which expressly requires your written physical signature and express agreement for any amendment

Termination

- What happens if ABC want to terminate but there has been no breach?
- Consider the below email:

Dear Charlotte

It seems that we are having some cash flow problems our end and regrettably we need to cancel your services with immediate effect.

Apologies for any inconvenience this causes.

Hopefully we can work together again in the future?

Best wishes

Jenny

On behalf of ABC Buyer LTD

Termination

- What does the contract say re termination?
- Clause 13.1 allows for termination stating:
“The Buyer may terminate this Purchase Order in whole or in part at any time upon the Buyer’s written notice to the Seller (i) for any reason at the Buyer’s convenience”
- If you are typically the Buyer/Purchaser, make sure this clause is included!
- What about if you are the Seller? Try & negotiate to remove this term, or as a minimum make sure you are protected re payment e.g *“upon termination of the Purchase Order by the Buyer, the Seller shall be entitled to payment for all services/provided to date in full”*

Termination

- What if the contract says nothing about termination?
- Consider whether there has been a breach of contract
- In cases of no breach:
 - Contract to last for indefinite period – contract can be terminated but only if “reasonable notice” given
 - Fixed Term Contract – cannot terminate (would be a breach by you if you sought to terminate)

Remember...

- Timing is everything!! Acceptance = final
- Do not expressly accept a PO/T&C's or commence providing the services/goods until and unless you are happy to be bound by those terms. If you accept, the terms are binding & very difficult to change.
- Seek to incorporate your own terms or amend the other party's terms prior to acceptance
- Variation is possible post acceptance, but not always
- Be careful of pre-contractual negotiation as this may form part of the contract – protect yourself with an entire-agreement clause or “subject to contract”
- Termination – please include a clause!
- If you take one step, make sure your PO says what you want it to say as this will prevail over your T&C's if any conflicting terms