



# Terms & Conditions of Business

Support & Maintenance Services

May 2022

thinc\*

# Terms & Conditions of Business

## Support & Maintenance Services

### 1. Definitions

Unless inconsistent with the context or otherwise specified the following definitions will apply:

|                                     |  |
|-------------------------------------|--|
| <b>We(we)/Our(our)/Us(us)</b>       | Diazone Computer Services Limited (CRN 4332326) trading as Thinc whose registered office is 2 Merchants Quay, Salford, M50 3XR   |
| <b>You/you</b>                      | The person or legal entity named in orders or the Support Schedule   |
| <b>Period of cover</b>              | The initial contractual period shown in your Support Schedule and any automatic renewal thereof as hereinafter set out.  |
| <b>Fees</b>                         | The charges identified in any orders or the Support Schedule for the Services or any increase or subsequent adjustment thereto as agreed between us.   |
| <b>Services</b>                     | The support and maintenance services which we have contracted to provide to you as detailed in the Support Schedule.   |
| <b>Support Schedule</b>             | The Thinc Support and Maintenance Schedule, presented upon order, which tells you the Services for which you are covered, the initial period of cover and other details about your support arrangements.   |
| <b>Computer Virus/Malware</b>       | Any programme or software, which prevents any operating system, licensed computer programme or licensed software working properly or at all.   |
| <b>Remote Access</b>                | The facility whereby we can gain access to your computer network and software applications remotely for the purposes of fault and query resolution.  |
| <b>Support Desk</b>                 | Our employees, who take telephone calls during Working Hours from clients seeking assistance under Thinc support and maintenance agreements.   |
| <b>Spyware/Adware</b>               | Non-viral malicious code/programme (which normally gains access to a computer network via web browsing traffic) or similar programmes which can lead to, amongst other problems, unauthorised access, information theft and diminished system performance. |
| <b>Intellectual Property Rights</b> | Means all patents, copyrights, design rights, trade marks, service marks, trade secrets, know how, database rights, actual property rights (whether registered or unregistered) and all applications for the same anywhere in the world.                   |
| <b>Site(s)</b>                      | The site locations detailed in the Support Schedule where we may perform Services.   |

## 2. Services to be provided

2.1 We agree to provide the Services upon the terms and conditions of this agreement.

## 3 Term

3.1 The Services shall commence on the date identified as the Period of cover in the Support Schedule and shall continue from year to year thereafter, unless and until terminated in accordance with these terms and conditions.

## 4 Payment

- 4.1 You shall pay the Fees (being non-refundable (save as provided in clause 13)) periodically in advance in the manner as specified in the Support Schedule. No Services or goods shall be provided until payment has been received by us.
- 4.2 Any Fees or other charges payable by you shall be paid within 14 days after the date of our invoice to you unless otherwise agreed in writing by us.
- 4.3 The Fees and other charges payable hereunder are exclusive of VAT, which shall be payable by you at the rate and in the same manner for the time being prescribed by law against submission of a tax invoice.
- 4.4 We shall have the right to charge interest on overdue invoices at the rate of 4% per year above the base rate of National Westminster Bank plc, calculated from the date when payment of the invoice becomes due for payment up to and including the date of actual payment, whether before or after judgment.
- 4.5 We shall be entitled at the end of each Period of cover to increase or change the Fees and other charges to accord with any change in our standard scale of charges by giving to you not less than 90 days' prior written notice. In the event that a price change is not agreed then either party may terminate this agreement with effect from the end of the relevant Period of cover.

## 5 Sale of Goods

- 5.1 Risk in any goods sold by us to you shall pass to you on delivery and title shall pass upon payment being made by you to us.
- 5.2 You acknowledge that any software products supplied by us to you are supplied subject to third party software licences or end user licences, which you undertake to comply with and you agree to indemnify us in respect of any breach by you thereof.

## 6 Services

- 6.1 During the continuance of this agreement, we shall provide the Services to you in any reasonable manner we see fit within the Working Hours as reasonably required from time to time provided that you shall fully cooperate with us to enable us to fulfill our obligations to you.
- 6.2 If you request any Services outside of Working Hours these will be performed at our discretion and may be chargeable by us at our current published standard out of hours rates, unless otherwise stated in the Support Schedule.

6.3 In particular, you agree to supply to us a detailed description of any fault covered by the Services

we offer to perform and the circumstances in which it arose, and shall submit sufficient material and information to enable us to duplicate the problem if we so require.

6.4 When appropriate, we will endeavour to give an estimate of how long a problem may take to resolve. We will keep you informed of the progress of problem resolution.

6.5 We may provide you with such advice by telephone, facsimile transmission or mail (including electronic mail), as shall be necessary to help you to resolve your difficulties and queries which are subject to the Services.

6.6 Time shall not be of the essence in performing any of the Services.

6.7 We do not guarantee to restore your system to its state immediately prior to a system or hardware failure, as this amongst other things is dependent on your internal back-up routines and the timing of the hardware failure.

6.8 Loan Equipment:-

6.8.1 It is possible that you will need replacement hardware while your own equipment is being repaired or replaced. We may in our entire discretion, provide and install loan equipment for your use until such time as your hardware can be returned and reinstalled, or otherwise upon our request for its return. The loan equipment will be provided free of charge and will remain our property at all times, unless otherwise agreed.

6.8.2 Subject to any software licensing restrictions, we may load any software, which requires being loaded on to the loan hardware in order to restore as far as reasonably practicable normal operating conditions. We cannot be held responsible for any loss of data incurred by faulty back-up media or incomplete backup procedures. Only licensed programmes and data available at the time of the fault can be restored.

6.8.3 You agree to return all loan equipment to us upon demand and to return it to us in substantially the same condition as it was when loaned to you. You will indemnify us against any loss costs or damages we suffer as a result of any breach of your obligations to us in this regard.

## **7 Matters that are excluded from the Services**

7.1 We shall be under no obligation to provide support and maintenance in respect of:-

7.1.1 problems resulting from any modifications or customisation of the supported software or the equipment not authorised in writing by us;

7.1.2 any software or computer hardware or other equipment not purchased from Thinc or otherwise listed in the Support Schedule;

7.1.3 incorrect or unauthorised use of the supported software or computer hardware or other equipment or operator error, where these are defined as use or operation not in accordance with our recommendation or the recommendation of the manufacturer or supplier;

7.1.4 any programmes used in conjunction with the supported software; 7.1.5 use of the elements of the supported software in any combination other than those agreed by us;

7.1.6 use of the supported software with computer hardware, equipment, operating systems or other supporting software other than those specifically agreed in writing with us; and

7.1.7 Your failure to install and use upon the computer hardware or other equipment in substitution for the previous release and new release of the supported software within 7 days of its receipt.

7.2 We shall upon request by you provide support and maintenance notwithstanding that the fault results from any of the circumstances described in clause 7.1 above. Any time spent by us investigating such faults will be

chargeable at our current rates. We shall invoice such charges at our discretion and such shall be paid by you within 30 days of the date of said invoice.

- 7.3 We reserve the right to discontinue all or part of the Services for any prior version of the supported software if a superseding version has been made available to you.
- 7.4 We shall not be obliged to make modifications in relation to your computer hardware, operating system software, or third party application software or any data feeds or external data.

## 8 Warranty

- 8.1 We warrant to you all Services supplied under this agreement will be carried out with reasonable care and skill by personnel whose experience will be appropriate for the tasks to which they are allocated.
- 8.2 Except as expressly provided in this Agreement, no warranty, condition, undertaking or term, express or implied, statutory or otherwise, as to the satisfactory quality, fitness for purpose, or ability to achieve a particular result is given or assumed by us, and all such warranties, conditions, undertakings and terms are excluded.
- 8.3 We do not warrant that all problems discovered or complained of or other errors can and will be corrected by us.

## 9 Liability

- 9.1 Save in respect of claims for death or personal injury arising from our negligence, in no event will we be liable for any damages resulting from loss of data or, lost profits, loss of anticipated savings, nor for any damages that are an indirect or secondary consequence of any act or omission by us, whether such damages were reasonably foreseeable or actually foreseen and without prejudice to the generality of the foregoing we will not be liable for any loss or damages:-
- 9.1.1 caused by non-performance or discharge of responsibilities by you or members of your staff
  - 9.1.2 caused by repairs, modifications or alterations to equipment carried out without our prior written approval
  - 9.1.3 caused by modifications or alterations to your computer network or systems configuration carried out without our prior written approval
  - 9.1.4 to your computer network, systems or application software arising from Computer Viruses, Malware, Adware, Spyware or activities by parties deemed by us to have malicious intent. This is regardless of security systems that you have in place or which may have been implemented by us
  - 9.1.5 to your computer network, systems or application software arising from theft or any force majeure event (see clause 22 below)
  - 9.1.6 to your computer network, systems or application software arising from abuse, negligence or vandalism, whether caused by your employees or by third parties.
- 9.2 Except as provided above in the case of personal injury or death, our maximum liability to you under this agreement or otherwise for any cause whatsoever (whether in the form of the additional cost of remedial services or otherwise) will be (i) in the case of Services provided by us, for direct costs and damages only and will be limited to a sum equivalent to the Fees actually paid to us for services in the current year or over the relevant period of default (whichever is the shorter) and that are the subject of your claim; or (ii) in the case of goods supplied by us, for direct costs and damages only and will be limited to the price of the goods which are the subject of your claim.
- 9.3 You acknowledge and agree that the limitations contained in this clause 9 are reasonable in the light of all the circumstances.

9.4 Your statutory rights as a consumer (if any) are not affected. All liability that is not expressly assumed in this agreement is excluded. These limitations will apply regardless of the form of action, whether under statute, in contract or tort, including negligence, or any other form of action.

9.5 Nothing in this agreement shall exclude or limit liability for fraudulent misrepresentation.

## **10 Your warranties**

10.1 You warrant that you have not relied on any oral representation made by us or upon any descriptions, illustrations or specifications contained in any catalogues and publicity material produced by us which are only intended to convey a general idea of the products and services mentioned.

10.2 You warrant that you shall comply in all material respects with all applicable laws, regulations and codes of conduct (whether statutory or otherwise) of the United Kingdom, and that all licences, permissions and consents required for carrying on your business and using the relevant software have been obtained and are in full force and effect.

## **11 Your obligations**

11.1 You shall:-

11.1.1 operate the software, maintain data and your database in accordance with any appropriate user or operator manual;

11.1.2 follow our reasonable instructions and house keeping recommendations relating to your hardware, software, infrastructure and back up routines;

11.1.3 by arrangement, grant access to premises and/or systems at all times for support and maintenance;

11.1.4 make hardware accessible to our support staff, and when required enable logons or passwords required for such support staff (who will have their own logons);

11.1.5 Where appropriate, permit us to install the current version of software from time to time when upgrades or fixes occur, to provide a reasonable level of assistance in implementation and testing;

11.1.6 provide notice of intention to change hardware or operating system or data-feeds (and to which our consent is required).

11.2 You shall provide us with reasonable direct and Remote Access to your equipment and/or software, and shall provide such reasonable assistance as we may request, including, but not limited to, providing sample output and other diagnostic information.

## **12 Security and control**

12.1 You shall during the continuance of this agreement:-

12.1.1 effect and maintain adequate security measures to safeguard the supported software hardware and equipment from access or use by any unauthorised person;

12.1.2 retain the supported software (and all authorised copies thereof) hardware and equipment under your effective control;

12.1.3 comply with all reasonable instructions of the owner of the Intellectual Property Rights in the supported software with regard to the use of the supported software, including, without limitation, the implementation of upgrades thereto;

12.1.4 effect and maintain adequate data back up routines.

## **13 Termination**

13.1 You may terminate this agreement by giving at least 90 days written notice to us prior to the expiry of the initial Period of cover or the subsequent anniversary thereof each year.

13.2 We may terminate this agreement forthwith on giving notice in writing to you if:-

13.2.1 you commit any serious breach of any term of this agreement and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from us so to do, to remedy the breach (such request to contain a warning of our intention to terminate);

13.2.2 We are no longer able to source for you vendor maintenance (or any other software the Intellectual Property Rights in which is owned by a third party) for any reason.

13.3 You may terminate this agreement forthwith on giving notice in writing to us if we commit any serious breach of any term of this agreement and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from you so to do, to remedy the breach (such request to contain a warning of your intention to terminate).

13.4 Any termination of this agreement (howsoever occasioned) shall not affect any accrued rights or liabilities of either party, nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come onto or continue in force on or after such termination.

13.5 If we terminate this agreement pursuant to clause 13.2.1, then you shall not be entitled to any refund of the Fees and any balance owing will be immediately due and payable.

13.6 If we terminate this agreement pursuant to clause 13.2.2, then you may be entitled to a pro rata refund of the Fees paid in relation to the particular aspect of the services which we may no longer be able to provide.

13.7 If you terminate this agreement pursuant to clause 13.3 then you will be entitled to a pro rata refund of the Fees paid by you which relate to services which were due to be performed by us falling after the termination date.

## **14 Your confidential information**

14.1 We shall be entitled to identify you as our customer and as a licensee of any supported software to the owner of the Intellectual Property Rights of that supported software and also in our publicity materials. You agree that we may provide information relating to your use of the supported software to the owner of the Intellectual Property Rights therein and any other information as may be reasonably requested by them.

14.2 Subject to clause 14.1 above, we shall treat as confidential all information supplied by you under this agreement which is designated as confidential by you, or which is by its nature clearly confidential, provided that this clause shall not extend to any information which was rightfully in our possession prior to the commencement of this agreement, or which is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this clause). We shall not divulge any confidential information to any person except to our own employees, and then only to those employees who need to know the same. We shall ensure that our employees are aware of and comply with the provisions of this clause. The foregoing obligations shall survive any termination of this Agreement.

## **15 Data protection**

15.1 The parties undertake to comply with the provisions of the The General Data Protection Regulation 2018 and any related legislation.

## 16 Remote Access

16.1 If we have remote dial-up/modem or VPN broadband or similar access to any part of your hardware or equipment in the course of performing the services, then we will only use a Remote Access method approved by you (such approval not to be unreasonably withheld or delayed).

## 17 Interpretation

17.1 In this agreement unless the context otherwise requires:- 17.1.1

words importing any gender include every gender;

17.1.2 words importing the singular number include the plural number and vice versa;

17.1.3 words importing persons include firms, companies and corporations and vice versa;

17.1.4 any reference to an enactment includes reference to that enactment as amended or replaced from time to time and to any subordinate legislation or byelaw made under that enactment;

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

17.1.6 any party who agrees to do something will be deemed to fulfill that obligation if that party procures that it is done.

17.2 In the case of conflict or ambiguity between any provision contained in the body of this agreement and any provision contained in any schedule, the provision in the body of this agreement shall take precedence.

## 18 Agency, partnership

18.1 This agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the parties other than the contractual relationship expressly provided for in this agreement.

## 19 Amendments

19.1 This agreement may not be released, discharged, supplemented, interpreted, amended, varied or modified in any manner except by an instrument in writing signed by a duly authorised officer or representative of each of the parties to this agreement.

## 20 Assignment and sub-contracting

20.1 This agreement is personal to the parties and neither this agreement nor any rights, licences or obligations under it, may be assigned by either party without the prior written approval of the other party.

20.2 We may perform any or all of its obligations under this agreement through agents or subcontractors, provided that we shall remain liable for such performance

## 21 Entire agreement

21.1 This agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the subject matter of this agreement.



## **22 Force majeure**

22.1 Neither party shall have any liability under or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from circumstances beyond the reasonable control of that party. If such circumstances continue for a continuous period of more than 6 months, either party may terminate this Agreement by written notice to the other party.

## **23 Notices**

23.1 All notices under this Agreement shall be in writing

23.2 Notices shall be deemed to have been duly given:-

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

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

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

23.2.4 on the tenth business day following mailing, if mailed by airmail, postage prepaid in each case addressed to the most recent address, e-mail address, or facsimile number notified in writing to the other party.

## **24 Severance**

24.1 If any provision of this agreement is prohibited by law or judged by a court to be unlawful, void or unenforceable, the provision shall, to the extent required, be severed from this agreement and rendered ineffective as far as possible without modifying the remaining provisions of this agreement, and shall not in any way affect any other circumstances of or the validity or enforcement of this agreement.

## **25 Waiver**

25.1 No delay, neglect or forbearance on the part of either party in enforcing against the other party any term or condition of this agreement shall either be or be deemed to be a waiver or in any way prejudice any right of that party under this agreement. No right, power or remedy in this agreement conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party.

## **26 Third parties**

26.1 The parties confirm their intent not to confer any rights on any third parties by virtue of this Agreement and accordingly the Contract (Rights of Third Parties) Act 1999 shall not apply to this Agreement.

## **27 Proper law and jurisdiction**

27.1 This Agreement and all matters arising from it and any dispute resolutions referred to below shall be governed by and construed in accordance with English law.