

## **XTRATEC LIMITED: TERMS AND CONDITIONS OF BUSINESS**

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These are the terms and conditions of business of Xtratec Limited (company number 05929950) whose registered office and trading address is at Unit 4 Rose Lane Industrial Estate, Lenham Heath, Maidstone, Kent, England, ME17 2JN (“Xtratec”) for construction materials testing services

### **CONTENTS**

#### **CLAUSE**

1.	Interpretation .....	1
2.	Application of conditions .....	1
3.	Basis of contract .....	1
4.	Standards of Testing .....	2
5.	Prices.....	2
6.	Payment .....	2
7.	Delivery of results, performance of services and acceptance.....	3
8.	Limitation of liability .....	3
9.	Confidentiality and Xtratec’s property .....	4
10.	Termination.....	5
11.	Force majeure .....	5
12.	Waiver .....	6
13.	Severance.....	6
14.	Status of pre-contractual statements .....	6
15.	Assignment.....	6
16.	Third party rights .....	6
17.	Notices.....	6
18.	Governing law and jurisdiction .....	6

## 1. INTERPRETATION

1.1 The following definitions and rules of interpretation in this clause apply in these conditions.

**Contract:** The Client's order and Xtratec's acceptance of it in accordance with condition 3.3.

**Client:** the person, firm or company who instructs Xtratec to carry out testing.

**Testing:** the testing agreed in the Contract to be carried out by Xtratec for the Client (including in each case any part or parts of it).

**VAT:** value added tax chargeable under English law for the time being and any similar additional tax.

1.2 Condition headings do not affect the interpretation of these conditions.

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

## 2. APPLICATION OF CONDITIONS

2.1 These conditions shall:

- (a) apply to and be incorporated in the Contract; and
- (b) prevail over any inconsistent terms or conditions contained in or referred to in the Client's contract, purchase order, confirmation of order, or specification, or implied by law, trade custom, practice or course of dealing.

2.2 No addition to, variation of, exclusion or attempted exclusion of any term of the Contract shall be binding on Xtratec unless in writing and signed by Xtratec

## 3. BASIS OF CONTRACT

3.1 Any quotation is valid for a period of 30 days only, and Xtratec may withdraw it at any time by notice to the Client.

3.2 Each order or acceptance of a quotation for Testing by the Client shall be deemed to be an offer by the Client subject to these conditions. The Client shall ensure that its order is complete and accurate.

3.3 A binding contract shall not come into existence between Xtratec and the Client unless and until Xtratec issues a written order acknowledgement to the Client, or Xtratec delivers (or installs, as appropriate) the results of the Testing to the Client (whichever occurs first).

3.4 Xtratec may deliver the results of the Testing by separate instalments. Each separate instalment may be invoiced for and must be paid for in accordance with the provisions of the applicable Contract. Each instalment shall be a separate Contract and no cancellation or termination by either party of any one Contract relating to an instalment shall entitle the Client to repudiate or cancel any other Contract or instalment.

3.5 No order which has been acknowledged by Xtratec may be cancelled by the Client, except with the agreement in writing of Xtratec and provided that the Client indemnifies Xtratec in full against all loss (including loss of profit), costs

(including the cost of all labour and materials used), damages, charges and expenses incurred by Xtratec as a result of cancellation.

#### **4. STANDARDS OF TESTING**

- 4.1 The Testing shall be carried out by Xtratec to the standards required by the UK accreditation body, UKAS, applicable to the testing in question.
- 4.2 Xtratec shall test appropriate samples of relevant materials, but shall not be liable if – through no fault of Xtratec – the samples are not in fact representative of the whole of the materials
- 4.3 Xtratec's employees, contractors and agents are not authorised to make any contractually binding representations concerning the Testing. In entering into the Contract, the Client acknowledges that it does not rely on, and waives any claim for breach of, any such representations which have not been confirmed in writing by an authorised officer of Xtratec. However, nothing in these conditions limits Xtratec's liability for fraudulent misrepresentation.
- 4.4 Any advice or recommendation given by Xtratec or its employees, contractors or agents to the Client or its employees, contractors or agents about the results of the Testing which is not confirmed in writing by Xtratec is followed or acted on entirely at the Client's own risk.

#### **5. PRICES**

- 5.1 All prices shall be as stated in Xtratec' acknowledgement of order or in a contract signed by a director of Extratec. All prices are exclusive of delivery, packaging, packing, shipping, carriage, insurance, VAT and other charges and duties, unless otherwise specified.
- 5.2 The price for the Testing is based on the rate prevailing at the date of Xtratec's acknowledgement of the order and Xtratec may increase the price to cover any increases due to market conditions (including, but not limited to, increases in labour, materials, supply, or transportation costs) which affect Xtratec at the date of Testing.
- 5.3 The price of the Testing shall be Xtratec' quoted price or, where no price has been quoted (or a quoted price is no longer valid), such price as is fair and reasonable.

#### **6. PAYMENT**

- 6.1 Subject to any special terms agreed in writing between the Client and Xtratec, Xtratec may invoice the Client for the price of the Testing on or at any time after delivery of the results of the Testing, unless:
  - (a) the results are to be collected by the Client; or
  - (b) the Client wrongfully fails to take delivery of the results,and in either case Xtratec shall be entitled to invoice the Client for the price at any time after Xtratec have notified the Client that the results are ready for collection.
- 6.2 The terms of payment shall be within 30 days of the date of Xtratec' invoice, whether or not delivery has taken place or title in the Testing has passed to

the Client. Time for payment of the price shall be of the essence of the Contract.

6.3 If the Client fails to make payment in full on the due date, the whole of the balance of the price of the Testing then outstanding shall become immediately due and payable and, without prejudice to any other right or remedy available to Xtratec, Xtratec may:

- (a) terminate the Contract or suspend any further deliveries of results (whether ordered under the same contract or not) to the Client;
- (b) appropriate any payment made by the Client to such of the Testing (or the Testing carried out under any other contract between the Client and Xtratec) as it thinks fit (despite any purported appropriation by the Client);
- (c) charge interest on the amount outstanding from the due date to the date of receipt by Xtratec (whether or not after judgment), at the annual rate of 4% above the base lending rate from time to time of Barclays Bank plc accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment. Xtratec reserves the right to claim interest under the Late Payment of Commercial Debts (Interest) Act 1998; and
- (d) suspend all further testing until payment has been made in full.

6.4 All sums payable to Xtratec under the Contract shall become due immediately on its termination, despite any other provision of the Contract. This condition 6.4 is without prejudice to any right to claim for interest under the law, or any right under the Contract.

6.5 Xtratec may, without prejudice to any other rights it may have, set off any liability of the Client to Xtratec against any liability of Xtratec to the Client.

6.6 If Xtratec issues court proceedings to recover any sums due to it from the Client, then it shall be entitled to claim from the Client on an indemnity basis the full costs incurred by Xtratec in and in connection with those court proceedings, whether or not they are a "Small Claim" under the rules of the court

## **7. DELIVERY OF RESULTS, PERFORMANCE OF SERVICES AND ACCEPTANCE**

7.1 Xtratec shall use its reasonable endeavours to deliver the results of the Testing on or (at its option) before the date or dates specified in Xtratec's acknowledgement of order or contract, but any such date is approximate only. If no dates are so specified, delivery shall be within a reasonable time of acceptance of the order. Time is not of the essence and Xtratec is not liable for any delay in delivery, return or performance, however caused.

## **8. LIMITATION OF LIABILITY**

8.1 The following provisions set out the entire financial liability of Xtratec (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Client in respect of:

- (a) any breach of the Contract; and

- (b) any representation, statement or tortious act or omission (including negligence) arising out of or in connection with the Contract but they do not affect the Client's rights as a consumer (if the Client is a consumer).
- 8.2 All warranties, conditions and other terms implied by statute or common law are excluded from the Contract to the fullest extent permitted by law.
- 8.3 Nothing in these conditions excludes or limits the liability of Xtratec for:
  - (a) death or personal injury caused by Xtratec's negligence; or
  - (b) fraud or fraudulent misrepresentation.
- 8.4 Subject to condition 8.2 and condition 8.3:
  - (a) Xtratec shall not be liable, whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation or otherwise for:
    - (i) loss of profits; or
    - (ii) loss of business; or
    - (iii) depletion of goodwill or similar losses; or
    - (iv) loss of anticipated savings; or
    - (v) loss of goods; or
    - (vi) loss of contract; or
    - (vii) loss of use; or
    - (viii) loss or corruption of data or information; or
    - (ix) any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses.
  - (b) Xtratec's total 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 the Contract shall be limited to the price payable for the Testing or Service under condition 5.

## **9. CONFIDENTIALITY AND XTRATEC'S PROPERTY**

- 9.1 The Client shall keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to the Client by Xtratec or its agents, and any other confidential information concerning Xtratec's business or its products which the Client may obtain. The Client shall restrict disclosure of such confidential material to such of its employees, agents or sub-contractors as need to know the same for the purpose of discharging the Client's obligations to Xtratec, and shall ensure that such employees, agents or sub-contractors are subject to obligations of confidentiality corresponding to those which bind the Client.
- 9.2 All materials, Testing and tools, drawings, specifications and data supplied by Xtratec to the Client shall at all times be and remain the exclusive property of Xtratec, but shall be held by the Client in safe custody at its own risk and maintained and kept in good condition by the Client until returned to Xtratec, and shall not be disposed of or used other than in accordance with Xtratec's written instructions or authorisation.

9.3 Xtratec will keep the Client's personal data confidential while it is needed for the purposes of fulfilling its contractual and other legal obligations and to protect its and its suppliers' legitimate interests, but will then delete it on request by the Client

9.4 This condition 9 shall survive termination of the Contract, however arising.

## **10. TERMINATION**

10.1 Without prejudice to any other right or remedy available to Xtratec, Xtratec may terminate the Contract or suspend any further Testing under the Contract without liability to the Client and, if the results of the Testing have been delivered but not paid for, the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary if:

- (a) an order is made, or a resolution is passed for the winding up of the Client, or circumstances arise which entitle a court of competent jurisdiction to make a winding-up order in relation to the Client; or
- (b) an order is made for the appointment of an administrator to manage the affairs, business and property of the Client, or documents are filed with a court of competent jurisdiction for the appointment of an administrator of the Client, or notice of intention to appoint an administrator is given by the Client or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986); or
- (c) a receiver is appointed of any of the Client's assets or undertaking, or if circumstances arise which entitle a court of competent jurisdiction or a creditor to appoint a receiver or manager of the Client, or if any other person takes possession of or sells the Client's assets; or
- (d) the Client makes any arrangement or composition with its creditors, or makes an application to a court of competent jurisdiction for the protection of its creditors in any way, or becomes bankrupt; or
- (e) the Client ceases, or threatens to cease, to trade; or
- (f) the Client takes or suffers any similar or analogous action in any jurisdiction in consequence of debt.

10.2 Termination of the Contract, however arising, shall not affect or prejudice the accrued rights of the parties as at termination or the continuation of any provision expressly stated to survive or implicitly surviving termination.

## **11. FORCE MAJEURE**

Xtratec reserves the right to defer the date of delivery, or to cancel the Contract or reduce the amount of Testing ordered, if it is prevented from or delayed in 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 Xtratec or any other party), failure of a utility service or transport 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 (Force Majeure Event).

**12. WAIVER**

12.1 A waiver of any right under the Contract is only effective if it is in writing and signed by or on behalf of the waiving party, and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

12.2 Unless specifically provided otherwise, rights arising under the Contract are cumulative and do not exclude rights provided by law.

**13. SEVERANCE**

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

**14. STATUS OF PRE-CONTRACTUAL STATEMENTS**

Each of the parties acknowledges and agrees that in entering into the Contract 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 the Contract.

**15. ASSIGNMENT**

15.1 Neither party may, without the prior written consent of the other party, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under the Contract.

**16. THIRD PARTY RIGHTS**

The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns, and is not intended to benefit, or be enforceable by, anyone else.

**17. NOTICES**

Any notice required to be given pursuant to 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 address of the party as set out in these conditions, or such other address as may be notified by one party to the other. A notice delivered by hand is deemed to have been received when delivered (or, if delivery is not in business hours, 9.00 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.

**18. GOVERNING LAW AND JURISDICTION**

18.1 The Contract and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or

claims) are governed by and construed in accordance with the law of England.

- 18.2 The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract or its subject matter or formation (including non-contractual disputes or claims).