

Software Maintenance – General Terms and Conditions

1. Interpretation

Affiliate: includes, in relation to either party, each and any subsidiary or holding company of that party and each and any subsidiary of a holding company of that party.

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

Charges: the charges payable for the Services under the Contract, being (where the context so requires) each or any of the following:

- a) the charges for the Service set out in the Quotation; and
- b) any charges agreed for Optional Services.

Commencement Date: the date on which the Software is delivered under the Licence, unless otherwise agreed between the parties.

Confidential Information: has the meaning given in condition 9.

Conditions: the terms and conditions set out in this document as amended from time to time in accordance with condition 21.

Contract: the contract between ZEISS and the Customer for the purchase of the Services in accordance with these conditions.

Customer: the person or firm who purchases the Services from ZEISS.

Control: the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and **Controls, Controlled** and the expression **change of Control** shall be interpreted accordingly.

Critical Fault: a reproducible fault which substantially hinders or prevents the Customer from using a material part of the functionality of the software in question.

Customer Contacts: the two persons appointed by the Customer from time to time under condition 8.4, whose names are notified to ZEISS in writing.

Data Protection Legislation: all applicable data protection and privacy legislation in force from time to time in the UK including the retained EU law version of the General Data Protection Regulation ((EU) 2016/679) (UK GDPR), the Data Protection Act 2018 (and regulations made thereunder) or any successor legislation, and all other legislation and regulatory requirements in force from time to time which apply to a party relating to the use of personal data (including, without limitation, the privacy of electronic communications).

Deliverables: any documentation, software, know-how or other works created or supplied by ZEISS (whether alone or jointly) in the course of providing the Services, but shall not include the Supported Software.

Documentation: the documents provided by ZEISS (in English) for the Software, in either printed text or machine-readable form, including the technical documentation, program specification and operations manual.

Intellectual Property Rights: patents, utility models, rights to inventions, copyright and related rights, trade marks and service marks, trade names and domain names, rights in get-up, goodwill and the right to sue for passing off or unfair competition, rights in designs, rights in computer software, database rights, rights to preserve the confidentiality of information (including know-how and trade secrets) and any other intellectual property rights, including all applications for (and rights to apply for and be granted), renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist, now or in the future, in any part of the world.

Licence: the licence agreement for the licence of the Software between the parties as referenced in the Quotation (or otherwise annexed to these Conditions).

Maintenance Release: a release of updates and hotfixes to the Software which correct faults, add functionality or otherwise amend or upgrade the Software, but which does not constitute a New Version.

Modification: any Maintenance Release or New Version which is acquired by the Customer.

New Version: any new version of the Software which from time to time is publicly marketed and offered for purchase by ZEISS in the course of its normal business.

Non-Critical Fault: any reproducible fault in the Software other than a Critical Fault.

Optional Service: any services described in the Quotation as optional services and any other services that the Customer and ZEISS may from time to time agree shall be supplied to the Customer by ZEISS under the terms of the Contract.

Open-source Software: open-source software as defined by the Open Source Initiative (<http://opensource.org>) or the Free Software Foundation (<http://www.fsf.org>) which forms part of the Deliverables and/or the Software.

Order: the Customer's order for the Services as set out in the Customer's purchase order form, the Customer's written acceptance of the Quotation, or overleaf, as the case may be.

parties or party: means the Customer and ZEISS.

Platform: the platform on which the Software runs as described in the Quotation or otherwise notified to the Customer by ZEISS.

Proprietary Third-Party Software: any software forming part of the Deliverables that is not Open-Source Software and is not owned by ZEISS.

Quotation: means the quotation for the Services as provided by ZEISS to the Customer.

Representatives: has the meaning given in condition clause 10.

Service Levels: those standards of performance to be achieved by ZEISS in performing the Services as set out in the Service Level Agreement.

Service Level Agreement: the relevant Carl ZEISS Ltd Software Support Level Agreement between ZEISS and the Customer as described in the Quotation (or otherwise annexed to these Conditions).

Services: includes (as appropriate) the support services, more particularly described the Quotation (or otherwise annexed to these Conditions), which are to be provided by ZEISS to the Customer under condition 4 and any Optional Services (if any) which are included within an order for Optional Services under condition 5.

Software: the Software as detailed in the Quotation.

Standard Support Hours: ZEISS normal business hours Monday to Friday, except on days which are bank holidays in England.

Supported Software: has the meaning set out in condition 3.1.

Term: has the meaning set out in condition 15.

Third-Party Licences: any licences under which Third-Party Software is provided.

Third-Party Software: means Open-Source Software or Proprietary Third-Party Software.

VAT: value added tax imposed by the Value Added Tax Act 1994 or any similar tax chargeable in the UK or elsewhere.

ZEISS: Carl ZEISS Limited, a private limited company incorporated and registered in England and Wales with company number 00542141 whose registered office is at ZEISS House, 1030 Cambourne Business Park, Cambourne, Cambridge, England, CB23 6DW.

ZEISS Predictive Service: A pre-installed software programme that proactively monitors and collects technical data such as operating hours, cycle counts and voltages via a secure connection to ZEISS data centre.

- 1.1 The headings in these Conditions do not affect its interpretation. Except where the context otherwise requires, references to conditions are to the conditions contained in these Conditions.
- 1.2 Unless the context otherwise requires:
 - (a) words in the singular shall include the plural and in the plural shall include the singular.
 - (b) a reference to one gender shall include a reference to the other genders.
 - (c) a reference to any party shall include that party's personal representatives, successors and permitted assigns.
 - (d) a reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it
 - (e) any words following the terms **including**, **include**, **in particular**, **for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.

- 1.3 A reference to a **holding company** or a **subsidiary** means a holding company or a subsidiary (as the case may be) as defined in section 1159 of the Companies Act 2006
- 1.4 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality) and that person's personal representatives, successors and permitted assigns.
- 1.5 A reference to **writing** or **written** includes email.
- 1.6 If there is any conflict or ambiguity between the Quotation and the Conditions, the Conditions shall take precedence.

2. Basis of Contract

- 2.1 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by law, trade custom, practice or course of dealing.
- 2.2 ZEISS will provide the Customer with a Quotation and, if the Customer wishes to proceed, it will submit an Order to ZEISS within any validity period set out in a Quotation.
- 2.3 The Order constitutes an offer by the Customer to purchase the Services in accordance with these Conditions. The Customer is responsible for ensuring that the terms of the Order are complete and accurate.
- 2.4 The Order will only be deemed to be accepted when ZEISS issues a written acceptance of the Order, at which point and on which date the Contract shall come into existence.

3. Subject of Contract, Supported Software

- 3.1 The Supported Software is:
 - (a) the Software (being the latest version of the Software released by ZEISS from time to time);
 - (b) any Modification which is acquired by the Customer (whether under the Licence, the Contract or any other agreement between ZEISS and the Customer) during the course of the Licence and which accordingly becomes part of the software defined as the Software under the Licence; and
 - (c) any other software which ZEISS and Customer agree in writing should be Supported Software for the purposes of the Contract.
- 3.2 In relation to Maintenance Releases as part of the Services, ZEISS shall from time to time make Maintenance Releases available to the Customer without charge.

4. The Services

- 4.1 ZEISS shall supply, and the Customer shall take and pay for,
- (a) the Services; and
 - (b) such of the Optional Services as are included from time to time within an order for Optional Services agreed between ZEISS and the Customer under condition 5.
- 4.2 Unless otherwise agreed by ZEISS in writing (including as Optional Services in accordance with condition 5) the Services do not include:
- (a) the installation of Maintenance Releases and/or of New Versions and/or of hardware supplements;
 - (b) on-site system and application engineering support services;
 - (c) the installation and delivery of any operating systems.
- 4.3 The Services shall meet the Service Levels.
- 4.4 In relation to the Services:
- (a) ZEISS will issue Modifications of the Supported Software only for the Platform either in intervals as set out in the Quotation, or as and when required and in whatever form (including in the case of Non-Critical Faults, by way of a local fix or patch of the Supported Software or a temporary by-pass solution), in each case in the absolute discretion of ZEISS;
 - (b) the Services will include the supply to the Customer of all revisions to the Documentation which are necessary in order to reflect any Modification acquired by the Customer;
 - (c) the Charges payable for the Services include the cost of any updated and New Versions of the Supported Software that run on the Platform; and
 - (d) once any Modification has been installed by the Customer, the Customer shall on request return all copies of the Software or any part of the Software which is superseded by that Modification.
- 4.5 ZEISS may, on prior notice to the Customer, make changes to the Services, provided such changes do not materially change the scope of the Services.
- 4.6 The Customer acknowledges and agrees that the Software represents a certain stage of development of the data processing program and may not be error-free.
- 4.7 Non-Critical Faults may be corrected by ZEISS in forthcoming Maintenance Releases from time to time as ZEISS in its sole discretion sees fit.

- 4.8 ZEISS shall have no obligation to provide the Services where faults arise from:
- (a) misuse, incorrect use of or damage to the Software from whatever cause (other than any act or omission by ZEISS), including failure or fluctuation of electrical power;
 - (b) failure to maintain the necessary environmental conditions for use of the Software;
 - (c) use of the Software in combination with any equipment or software not provided by ZEISS or not designated by ZEISS for use with any Modification forming part of the Supported Software, or any fault in any such equipment or software;
 - (d) relocation or installation of the Software by any person other than ZEISS or an adequately trained person approved by ZEISS and acting under ZEISS's instructions;
 - (e) any breach of the Customer's obligations under the Contract howsoever arising or having the Software maintained by a third party;
 - (f) any Modification not authorised by ZEISS; or
 - (g) operator error.

5. Orders for Optional Services

- 5.1 The Customer may from time to time request ZEISS to supply Optional Services of the type either as set out in the Quotation or such other services which ZEISS has agreed in writing to perform. Save where Optional Services have been set out and agreed in the Quotation, ZEISS shall be under no obligation to provide any Optional Service.
- 5.2 Where ZEISS agrees to provide Optional Services, such agreement shall be embodied in an order for Optional Services. Each order for Optional Services shall be made under, and shall incorporate, these Conditions.

6. Charges

- 6.1 In consideration of the Services (excluding for this purpose any Optional Services) and subject to receipt of a valid invoice from ZEISS, the Customer shall (unless otherwise agreed between the parties) pay the Charges on the earlier of (i) the payment dates set out in the Quotation and (ii) 30 days from the date of invoice.
- 6.2 New Versions and Maintenance Releases will be provided to the Customer free of charge as part of the Services provided they relate to the Platform. If a change of a Platform is requested or required during the Term, then a separate charge will become applicable for any New Versions and/or Maintenance Releases.
- 6.3 Any Optional Services (if any) to the Customer shall be agreed in writing before performance or supply by ZEISS, and shall be charged and invoiced to the Customer by ZEISS (and paid by the Customer) following acceptance by ZEISS of the Customer's written order for such Optional Services. Payment for any Optional Services shall be due within 30 days of the date of invoice.

- 6.4 The Customer shall pay all costs (at ZEISS's then prevailing rates) and reasonable expenses incurred by ZEISS for work carried out by ZEISS in connection with any fault which is not covered by the Contract.
- 6.5 If the Customer fails to make any payment due to ZEISS under the Contract by the due date for payment, then, without limiting ZEISS's remedies under condition 16, the Customer shall pay interest on the overdue amount at the rate of 8% per annum above the then current base lending rate of the Bank of England. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.
- 6.6 All amounts payable by the Customer under the Contract are exclusive of VAT (or any other equivalent local tax). Where any taxable supply for VAT purposes is made under the Contract by ZEISS to the Customer, the Customer shall, on receipt of a valid VAT invoice from ZEISS, pay to ZEISS such additional amounts in respect of VAT as are chargeable on the provision of the Services.
- 6.7 Without prejudice to condition 6.6, the Customer shall pay any stamp duties or similar transfer taxes imposed on the supplies made under the Contract and shall reimburse ZEISS for any such stamp duties or similar transfer taxes paid by ZEISS.
- 6.8 If the Customer is required to make any deduction for or on account of tax from any payment due under the Contract (**Tax Deduction**):
- (a) the Customer shall account to the relevant tax authority for such Tax Deduction and shall provide evidence to ZEISS that it has so accounted.
 - (b) the amount of the payment due under the Contract shall be increased so that ZEISS receives an amount equal to the amount that would have been received by it, had the Customer not been required to make any Tax Deduction.
- 6.9 All amounts due under the Contract shall be paid by the Customer to ZEISS in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).

7. Intellectual Property Rights

- 7.1 All Intellectual Property Rights in the Services, Software and in the Deliverables shall belong to ZEISS, and the Customer shall have no rights in respect of any of the Services, Software or the Deliverables except as expressly granted under the Contract. The Customer shall do or procure to be done all such further acts and things and sign or procure the signature of all such other documents as ZEISS may from time to time require for the purpose of giving ZEISS the full benefit of the provisions of this condition 7.1.

- 7.2 The Customer may not make the Software, any versions and updates thereof, any associated documentation and/or other documents received from ZEISS under and in connection with the Contract, available to any third party without ZEISS's prior written consent.
- 7.3 ZEISS undertakes at its own expense to defend the Customer or, at its option, settle any claim or action brought against the Customer alleging that the use or possession of any of the Software and/or of the Deliverables (or any part of them) by the Customer in accordance with the Contract infringes the UK Intellectual Property Rights of a third party (**Claim**) and shall be responsible for any reasonable losses, damages, costs (including legal fees) and expenses incurred by, or awarded against, the Customer as a result of or in connection with any such Claim. For the avoidance of doubt, this condition 7.3 shall not apply where the Claim in question is attributable to possession, use, development, modification or maintenance of the Software and/or the Deliverables (or any part thereof) by the Customer other than in accordance with the terms of the Contract, use of the Software and/or the Deliverables in combination with any hardware or software not supplied or specified by ZEISS, if the infringement would have been avoided by the use of the Software and/or of the Deliverables not so combined, or use of a non-current release of the Software.
- 7.4 Condition 7.3 is conditional on the Customer:
- (a) as soon as reasonably practicable, giving written notice of the Claim to ZEISS, specifying the nature of the Claim in reasonable detail;
 - (b) not making any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of ZEISS (such consent not to be unreasonably conditioned, withheld or delayed);
 - (c) giving ZEISS and its professional advisers at reasonable times (on reasonable prior notice) access to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of the Customer, so as to enable ZEISS and its professional advisers to examine them and to take copies (at ZEISS's expense) for the purpose of assessing the Claim; and
 - (d) subject to ZEISS providing security to the Customer to the Customer's reasonable satisfaction against any claim, liability, costs, expenses, damages or losses which may be incurred, taking such action as ZEISS may reasonably request to avoid, dispute, compromise or defend the Claim.
- 7.5 If any Claim is made, or in ZEISS's reasonable opinion is likely to be made, against the Customer, ZEISS may at its sole option and expense:
- (a) procure for the Customer the right to continue using, developing, modifying or maintaining the Software and/or the Deliverables (or any part of them) in accordance with the terms of the Contract;
 - (b) modify the Software and/or the Deliverables so that they cease to be infringing;

- (c) replace the Software and/or the Deliverables with non-infringing works; or
 - (d) terminate the Contract immediately on notice to the Customer and repay to the Customer all sums which the Customer has paid to ZEISS under the Contract during the year in which the termination occurs, less a charge for the Services performed up to the date of termination.
- 7.6 Notwithstanding any other provision in the Contract, condition 7.3 shall not apply to the extent that any claim or action referred to in that condition arises directly or indirectly through the possession, use, development, modification or maintenance of any Open-Source Software or Proprietary Third-Party Software incorporated into the Software and/or into the Deliverables.
- 7.7 This condition 7 constitutes the Customer's exclusive remedy and ZEISS's only liability in respect of Claims and, for the avoidance of doubt, is subject to condition 13.1.

8. The Customer's responsibilities

- 8.1 The Customer shall provide ZEISS, and all persons duly authorised by ZEISS with full, safe and uninterrupted access including remote access to the Customer's premises, systems, facilities and the Software as may reasonably be required for the purpose of performing the Services. Where the Services are to be performed at any of the Customer's premises, the Customer shall provide adequate working space and office facilities (including telephone) for use by the Support Staff and take reasonable care to ensure their health and safety. Where remote access is required by ZEISS, the Customer shall facilitate such remote access by promptly installing and running any remote access tools reasonably required and provided by ZEISS.
- 8.2 The Customer shall ensure that appropriate environmental conditions are maintained for the Supported Software and shall take all reasonable steps to ensure that the Supported Software is operated in a proper manner by the Customer's employees.
- 8.3 The Customer shall
 - (a) at the Commencement Date have a licence to use and install the most recent version of the Software and/or immediately but in any event no later than five (5) Business Days after the commencement Date acquire such licence;
 - (b) at the Customer's cost ensure that it has available adequately configured and compatible hardware (including input and output devices) as specified by ZEISS; and
 - (c) where the Software is included in a ZEISS instrument or ZEISS product, or if otherwise required by ZEISS connect to the ZEISS Predictive Service remote monitoring and maintenance system, or if this technology is not available, the Customer shall facilitate the application of standard remote monitoring and maintenance solutions such as Team Viewer and for the above purposes, the Customer must at all times acquire and maintain the required infrastructure and operating licences.

- 8.4 The Customer shall nominate two Customer Contacts, who shall be responsible for the co-ordination and be available to liaise with and respond to ZEISS's queries of all matters relating to the Contract, the Software and ZEISS's provisions of Services. All communications, documentation and materials relating to the Contract shall be sent as appropriate by ZEISS to the Customer Contacts. The Customer shall notify ZEISS in writing promptly if there is any proposed change to those appointments.
- 8.5 The Customer shall:
- (a) co-operate with ZEISS in performing the Services and provide any assistance or information as may reasonably be required by ZEISS, including in relation to the diagnosis of any faults;
 - (b) report faults promptly to ZEISS; and
 - (c) keep full backup copies of all of its data.
- 8.6 The Customer shall indemnify ZEISS against any losses, damages, costs (including legal fees) and expenses incurred by or awarded against ZEISS as a result of the Customer's breach of the Contract howsoever arising or any negligent or wrongful act of the Customer, its officers, employees, contractors or agents.

9. Risk and title

- 9.1 Risk in, and title to, any media bearing any Deliverables or other information that may from time to time be supplied by ZEISS to the Customer shall pass to the Customer on the later of delivery to the Customer or receipt of the Charges in full.

10. Confidentiality and publicity

- 10.1 **Confidential Information** means all confidential information (however recorded or preserved) disclosed by a party or its Representatives (as defined below) to the other party and that party's Representatives whether before or after the Commencement Date in connection with the Contract, including but not limited to:
- (a) the existence and terms of the Contract or any agreement entered into in connection with the Contract;
 - (b) any information that would be regarded as confidential by a reasonable business person relating to:
 - (i) the business, assets, affairs, customers, clients, suppliers, or plans, intentions, or market opportunities of the disclosing party (or of any member of the group of companies to which the disclosing party belongs); and
 - (ii) the operations, processes, product information, know-how, designs, trade secrets or software of the disclosing party (or of any member of the group of companies to which the disclosing party belongs); and

- (c) any information developed by the parties in the course of carrying out the Contract.

Representatives means, in relation to a party, its employees, officers, contractors, subcontractors, representatives and advisers.

- 10.2 The provisions of this condition shall not apply to any Confidential Information that:
- (a) is or becomes generally available to the public (other than as a result of its disclosure by the receiving party or its Representatives in breach of this condition);
 - (b) was available to the receiving party on a non-confidential basis before disclosure by the disclosing party;
 - (c) was, is or becomes available to the receiving party on a non-confidential basis from a person who, to the receiving party's knowledge, is not bound by a confidentiality agreement with the disclosing party or otherwise prohibited from disclosing the information to the receiving party; or
 - (d) the parties agree in writing is not confidential or may be disclosed; or
 - (e) is developed by or for the receiving party independently of the information disclosed by the disclosing party.
- 10.3 Each party shall keep the other party's Confidential Information secret and confidential and shall not:
- (a) use such Confidential Information except for the purpose of exercising or performing its rights and obligations under or in connection with the Contract (**Permitted Purpose**); or
 - (b) disclose such Confidential Information in whole or in part to any third party, except as expressly permitted by this condition 10.
- 10.4 A party may disclose the other party's Confidential Information to those of its Representatives who need to know such Confidential Information for the Permitted Purpose, provided that:
- (a) it informs such Representatives of the confidential nature of the Confidential Information before disclosure; and
 - (b) at all times, it is responsible for such Representatives' compliance with the confidentiality obligations set out in this condition.
- 10.5 A party may disclose Confidential Information to the extent such Confidential Information is required to be disclosed by law, by any governmental or other regulatory authority (including any relevant securities exchanges) or by a court or other authority of competent jurisdiction provided that, to the extent it is legally permitted to do so, it gives the other party as much notice of such disclosure as possible and, where notice of disclosure is not prohibited and is given in accordance with this condition 10.5, it takes into account the reasonable requests of the other party in relation to the content of such disclosure.

- 10.6 Each party reserves all rights in its Confidential Information. No rights or obligations in respect of a party's Confidential Information other than those expressly stated in the Contract are granted to the other party, or to be implied from the Contract.
- 10.7 On termination of the Contract, each party shall:
- (a) destroy or return to the other party all documents and materials (and any copies) containing, reflecting, incorporating or based on the other party's Confidential Information;
 - (b) erase all the other party's Confidential Information from computer and communications systems and devices used by it, including such systems and data storage services provided by third parties (to the extent technically and legally practicable); and
 - (c) certify in writing to the other party that it has complied with the requirements of this condition, provided that a recipient party may retain documents and materials containing, reflecting, incorporating or based on the other party's Confidential Information to the extent required by law or any applicable governmental or regulatory authority. The provisions of this condition shall continue to apply to any such documents and materials retained by a recipient party, subject to condition 16 (Termination).
- 10.8 Except as expressly stated in these Conditions, no party makes any express or implied warranty or representation concerning its Confidential Information.
- 10.9 The provisions of this condition 10 shall survive for a period of five years from termination of the Contract.
- 10.10 ZEISS may refer to the Customer as being a client of ZEISS in customer reference lists and sales presentations, but shall not refer to the Customer in any advertising or press release without the prior written consent of the Customer.

11. Data protection

- 11.1 The parties agree that neither party will process any personal data on the other party's behalf as a processor under the Contract.
- 11.2 If it becomes necessary for a party to process personal data on the other party's behalf in connection with the Contract, each party will at all times comply with Data Protection Legislation in connection with the processing of such personal data.

12. ZEISS warranties

- 12.1 ZEISS warrants to the Customer that:

- (a) the Services will be performed:
 - (i) in accordance with all laws and regulations which are directly applicable to ZEISS; and
 - (ii) with all reasonable skill and care; and
 - (b) at the Commencement Date, ZEISS has obtained and will maintain for the duration of the Contract all permissions, licences and consents necessary for ZEISS to perform the Services.
- 12.2 If, during the Term, ZEISS receives written notice from the Customer of any breach by ZEISS of the warranties contained in condition 12.1(a), ZEISS shall, at its own option and expense, remedy that breach within a reasonable period following receipt of such notice, or terminate the Contract immediately on written notice to the Customer and repay to the Customer all sums which the Customer has paid to ZEISS under the Contract during the year in which the termination occurs, less a charge for the Services performed up to the date of termination. The Customer shall provide all information reasonably necessary to enable ZEISS to comply with its obligations under this condition clause 11.2. This condition sets out the Customer's sole remedy and ZEISS's entire liability for breach of condition clause 11.1(a).
- 12.3 No representation or warranty is given by ZEISS that all faults will be fixed, or will be fixed within a specified period of time.
- 12.4 All other conditions, warranties or other terms which might have effect between the parties or be implied or incorporated into the Contract or any collateral contract, whether by statute, common law or otherwise, are hereby excluded, including the implied conditions, warranties or other terms as to satisfactory quality, fitness for purpose and the use of reasonable skill and care.

13. Limits of liability

- 13.1 Except as expressly stated in condition 13.2:
- (a) ZEISS shall not in any circumstances have any liability for any losses or damages which may be suffered by the Customer (or any person claiming under or through the Customer), whether the same are suffered directly or indirectly or are immediate or consequential, and whether the same arise in contract, tort (including negligence) or otherwise howsoever, which fall within any of the following categories:
 - (i) special damage, even though ZEISS was aware of the circumstances in which such special damage could arise;
 - (ii) loss of profits;
 - (iii) loss of anticipated savings;
 - (iv) loss of business opportunity;

- (v) loss of or goodwill;
- (vi) loss of, or damage to (including corruption of), data;

provided that this condition 13.1(a) shall not prevent claims for loss of or damage to the Customer's tangible property that fall within the terms of condition 13.1(b) or any other claims for direct financial loss that are not excluded by any of categories (i) to (vi) inclusive of this condition 13.1(a);

- (b) the total liability of ZEISS, whether in contract, tort (including negligence) or otherwise and whether in connection with the Contract or any collateral contract, shall in no circumstances exceed an amount of **£2,000**.

13.2 The exclusions in condition clause 11.4 and condition 12.1 shall apply to the fullest extent permissible at law but ZEISS does not exclude liability for:

- (a) death or personal injury caused by the negligence of ZEISS, its officers, employees, contractors or agents;
- (b) fraud or fraudulent misrepresentation;
- (c) breach of the obligations implied by section 12 of the Sale of Goods Act 1979 or section 2 Supply of the Goods and Services Act 1982; or
- (d) any other liability which cannot be excluded by law.

13.3 The Customer acknowledges that:

- (a) it is exclusively responsible for:
 - (i) reviewing any new Modifications;
 - (ii) ensuring that the staff of the Customer are trained in the proper use and operation of the Software;
 - (iii) making regular backup copies of its data to ensure recovery of its data if the Software malfunctions; and
 - (iv) the selection, use of and results obtained from any other programs, equipment, materials or services used in conjunction with the Software;
- (b) the level of the Charges reflects the allocation of risk between the parties set out in condition 12 and condition 13; and
- (c) it is in a better position than ZEISS to assess and manage its risk in relation to use of the Software.

13.4 All dates supplied by ZEISS for the delivery of the Modifications or the provision of Services shall be treated as approximate only. ZEISS shall not in any circumstances be liable for any loss or damage arising from any delay in delivery beyond such approximate dates.

- 13.5 All references to ZEISS in this condition clause 13 shall, for the purposes of this condition only, be treated as including all employees, subcontractors and suppliers of ZEISS and its Affiliates, all of whom shall have the benefit of the exclusions and limitations of liability set out in this condition, in accordance with condition clause 24.
- 13.6 Any claim (whatsoever and howsoever arising) by the Customer under the Contract shall become time barred, unless the Customer has issued proceedings in a court of competent jurisdiction within 12 months from the date on which the event or series of events on which such claim is based have occurred.
- 13.7 The Customer shall comply with the Third-Party Licences and shall indemnify ZEISS against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) suffered or incurred by ZEISS arising out of or in connection with the Customer's breach of the terms of any such Third-Party Licences, or any breach of the Contract by the Customer which causes ZEISS to breach the term of any Third-Party Licences.
- 13.8 ZEISS may treat the Customer's breach of any Third-Party Licence as a breach of the Contract.

14. Assignment and subcontracting

- 14.1 The Customer shall not assign, novate, charge, subcontract or deal in any other manner with any or all of its rights and obligations under the Contract without the prior written consent of ZEISS (such consent not to be unreasonably withheld or delayed).
- 14.2 ZEISS may at any time assign, novate, charge, subcontract or deal in any other manner with any or all of its rights and obligations under the Contract, provided it gives written notice to the Customer and for this purpose, ZEISS shall be entitled to disclose the Customer's name, address and any information contained in and/or required for the proper performance of the Contract to any assignee and/or subcontractor of ZEISS from time to time.
- 14.3 Each party confirms it is acting on its own behalf and not for the benefit of any other person.

15. Term

The Contract shall be deemed to have commenced on the Commencement Date. Unless terminated earlier in accordance with its terms, the Contract shall continue for the period set out in the Quotation (**Term**) whereafter it shall automatically terminate.

16. Termination

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

- (a) the other party fails to pay any amount due under the Contract on the due date for payment and remains in default not less than 30 days after being notified in writing to make such payment;
- (b) the other party commits a material breach of any other term of the Contract and (if such breach is remediable) fails to remedy that breach within a period of 14 days after being notified in writing to do so;
- (c) the other party repeatedly breaches any of the terms of the Contract in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of the Contract;
- (d) the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (being a company or limited liability partnership) is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 (**IA 1986**) as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the IA 1986 **OR** (being a partnership) has any partner to whom any of the foregoing apply;
- (e) the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors other than (being a company) for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (f) the other party applies to court for, or obtains, a moratorium under Part A1 of the Insolvency Act 1986;
- (g) a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the other party (being a company, limited liability partnership or partnership) other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
- (h) an application is made to court, or an order is made, for the appointment of an administrator, or a notice of intention to appoint an administrator is given or an administrator is appointed, over the other party (being a company, partnership or limited liability partnership);
- (i) the holder of a qualifying floating charge over the assets of that other party (being a company or limited liability partnership) has become entitled to appoint or has appointed an administrative receiver;
- (j) a person becomes entitled to appoint a receiver over all or any of the assets of the other party or a receiver is appointed over all or any of the assets of the other party;
- (k) a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued

against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;

- (l) any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in condition 16.1(d) to condition 16.1(k) (inclusive);
- (m) the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business; or
- (n) the other party's financial position deteriorates so far as to reasonably justify the opinion that its ability to give effect to the terms of the Contract is in jeopardy.

16.2 The Customer shall have the right to terminate the Contract before the expiration of its Term on giving ZEISS at least 30 days' notice in writing, provided that

- (a) during the Term the Customer's hardware has become obsolete (i.e. it has reached an end of support status) in that the hardware is no longer compatible with the Software; and
- (b) the Customer pays ZEISS an amount equivalent to 10% of the Charges payable under the Contract.

16.3 Either party may terminate the Contract in accordance with condition 26.

16.4 ZEISS may, without prejudice to its other rights or remedies, terminate the Contract immediately by notice to the Customer if the Customer:

- (a) undergoes a change of Control;
- (b) sells all of its assets or is merged or re-organised in circumstances where it is not the surviving entity; or
- (c) disputes the ownership or validity of ZEISS's Intellectual Property Rights.

16.5 The Contract shall automatically terminate on termination or expiry of the Licence, but expiry or any termination of the Contract (however caused) shall have no effect on the licences granted under the Licence.

17. Effect of termination

17.1 Other than as set out in the Contract, neither party shall have any further obligation to the other under the Contract after its termination.

17.2 Any provision of the Contract which expressly or by implication is intended to come into or continue in force on or after termination of the Contract shall remain in full force and effect.

- 17.3 Termination of the Contract, for any reason, shall not affect the accrued rights, remedies, obligations or liabilities of the parties existing at termination.
- 17.4 Notwithstanding its obligations in this condition 17, if a party is required by any law, regulation, or government or regulatory body to retain any documents or materials containing the other party's Confidential Information, it shall notify the other party in writing of such retention, giving details of the documents and/or materials that it must retain. The provisions of condition 10 shall continue to apply to any such documents and materials retained by a recipient party for the period of time for which they are required to be retained.
- 17.5 On termination of the Contract for any reason, the Customer's right to receive the Services shall cease automatically and each party shall as soon as reasonably practicable:
- (a) return, destroy or permanently delete (as directed in writing by the other party) any documents, handbooks or other information or data provided to it by the other party containing, reflecting, incorporating or based on Confidential Information belonging to the other party. If required by the other party, it shall provide written evidence (in the form of a letter signed by one of its directors no later than 30 days after termination of the Contract that these have been destroyed and that it has not retained any copies of them (except for one copy that it may use for audit purposes only and subject to the confidentiality obligations in condition 10), provided that the Customer may retain copies of any Supplier Confidential Information incorporated into the Software;
 - (b) return all of the other party's equipment and materials, failing which, the other party may enter the relevant premises and take possession of them. Until these are returned or repossessed, the party in possession shall be solely responsible for their safe-keeping,
- and any electronic data shall be considered deleted, for the purposes of this condition 17.5 where it has been put beyond use by the deleting party.
- 17.6 On termination of the Contract for any reason, the Customer shall immediately pay any outstanding unpaid invoices and interest due to ZEISS. ZEISS shall submit invoices for any Services that it has supplied, but for which no invoice has been submitted, and the Customer shall pay these invoices immediately on receipt.
- 18. Waiver**
- 18.1 A waiver of any right or remedy is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy.
- 18.2 A delay or failure to exercise, or the single or partial exercise of, any right or remedy shall not waive that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy.

19. Remedies

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

20. Entire Agreement

20.1 The Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous and contemporaneous agreements, promises, assurances and understandings between them, whether written or oral, relating to its subject matter.

20.2 Each party acknowledges that in entering into the Contract it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Contract.

20.3 Each party agrees that it shall have no claim for innocent or negligent misrepresentation based on any statement in the Contract.

21. Variation

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

22. Severance

22.1 If any provision or part-provision of the Contract 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 condition shall not affect the validity and enforceability of the rest of the Contract.

22.2 If one party gives notice to the other of the possibility that any provision or part-provision of the Contract is invalid, illegal or unenforceable, the parties shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable, and, to the greatest extent possible, achieves the intended commercial result of the original provision.

23. Third-party rights

No one other than a party to the Contract, their successors and permitted assignees, shall have any right to enforce any of its terms.

24. No partnership or agency

- 24.1 Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties, constitute any party the agent of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party.

25. Force majeure

- 25.1 Neither party shall be in breach of the Contract or otherwise liable for any failure or delay in the performance of its obligations if such delay or failure results from events, circumstances or causes beyond its reasonable control. The time for performance of such obligations shall be extended accordingly. If the period of delay or non-performance continues for 12 weeks, the party not affected may terminate the Contract by giving 30 days' written notice to the affected party.
- 25.2 If termination occurs under condition 25.1, all sums paid to ZEISS by the Customer under the Contract shall be refunded to the Customer, except that ZEISS shall be entitled to payment on a *quantum meruit* basis for all work done before termination.

26. Notices

- 26.1 Any notice given to a party under or in connection with the Contract shall be in writing and shall be:
- (a) delivered by hand or by pre-paid first-class post or other next working day delivery service at its registered office (if a company) or its principal place of business (in any other case); or
 - (b) sent by email to the address specified in the Quotation for ZEISS and in the Order for the Customer (or as otherwise notified by a party in writing).
- 26.2 Any notice shall be deemed to have been received:
- (a) if delivered by hand, at the time the notice is left at the proper address;
 - (b) if sent by pre-paid first-class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; or
 - (c) if sent by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume.
- 26.3 This condition does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

27. Dispute resolution

- 27.1 It is the intention of the parties to settle amicably by negotiation all disagreements and differences of opinion on matters of performance, procedure and management arising out of the Contract. Accordingly, it is agreed that the procedure set out in this condition 27 shall be followed in relation to any matter of dispute between the parties concerning performance, procedure or management.
- 27.2 If any disagreement or difference of opinion arises out of the Contract, the matter shall be disposed of as follows:
- (a) the Customer Contacts and the Support Customer Contacts shall meet to attempt resolution. Should they not meet within 14 days of the date on which either party convenes a meeting to resolve the matter, or should they not be able to resolve the matter with 14 days of first meeting; then
 - (b) the matter shall promptly be referred by either party to the managing director of the Customer and the managing director of ZEISS for immediate resolution.
- 27.3 If, within 14 days of the matter first having been referred to the managing directors no agreement has been reached as to the matter in dispute, the dispute resolution process set out in this condition 27 shall be deemed to have been exhausted in respect of the matter in dispute, and each party shall be free to pursue the rights granted to it by the Contract in respect of such matter without further reference to the dispute resolution process.
- 27.4 For the avoidance of doubt, this condition 27 shall not prevent either party from seeking injunctive relief in the case of any breach or threatened breach by the other of any obligation of confidentiality or any infringement by the other of the first-named party's Intellectual Property Rights.

28. Governing law

The Contract 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.

29. Jurisdiction

Subject to condition 27, 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 the Contract or its subject matter or formation (including non-contractual disputes or claims).

