

## Listening into Action® - Engaging and Empowering Staff to Drive Change

### TERMS AND CONDITIONS

These conditions shall apply to all Contracts for the provision of all Products and Services by Optimise which shall be deemed to be incorporated therein, and may only be varied with the written agreement of Optimise (“we” or “us”). These conditions shall prevail over any terms or conditions put forward at any time by our Clients (“you”) which shall not form any part of a Contract unless specifically agreed in writing by us.

#### 1. Application of Conditions

1.1 These conditions (together with the documents referred to herein) tell you the terms and conditions which shall apply to and be incorporated in the Contract. These conditions prevail over any inconsistent terms or conditions that you put forward contained in, or referred to in any correspondence, or other written material or implied by law, trade custom, practice or course of dealing.

1.2 Any variation to the Contract shall be in writing and signed by or on behalf of the parties.

#### 2. Our responsibilities under the Contract

2.1 We shall use reasonable endeavours to provide the Products and perform the Services with due skill and care, in accordance with all material respects within the Contract.

2.2 We shall assign appropriate, qualified personnel to perform the Services and ensure such personnel comply with all reasonable regulations made known to us with regard to the conduct of personnel at your premises.

2.3 We shall use reasonable endeavours to meet the dates specified in the Proposal/Arrangement Letter, but any such dates shall be estimates only and (subject to condition 5.5) time shall not be of the essence of the Contract.

2.4 We will take reasonable precautions against its causing or allowing computer viruses or other harmful code to contaminate your computers.

2.5 If the provision of the Services is compromised by the illness or injury of any of our personnel, we will contact you as soon as reasonably practicable and reserve the right to extend any dates or deadlines as appropriate. Should the illness or injury extend beyond a period of twenty business days (“**Period of Incapacity**”) we reserve the right to postpone the provision of Services thereafter for a period of up to six calendar months. For the avoidance of doubt any payments due in relation to the Services during the Period of Incapacity will remain payable. Should the provision of Services be postponed after the Period of Incapacity, any payments due thereafter shall be suspended until the provision of Services recommence.

2.6 In the unlikely and unforeseen event of the LiA Navigator being inaccessible or unavailable for a period of time outside the control of the client, or any 3<sup>rd</sup> party systems provider, or any software support provider of Optimise, we commit to providing the necessary materials, support or guidance needed for the duration of the LiA Navigator being unavailable, which would otherwise be accessed via the LiA Navigator, until such times as the system is available again.

### **3. Your responsibilities under the Contract**

3.1 You shall co-operate with us in all matters relating to the Products and Services allowing appropriate access to all key personnel within your organisation, and will appoint a Client Listening into Action Lead working in a full-time capacity to the CEO, who, in turn, shall have the authority to contractually bind the Trust on matters relating to the Contract.

3.2 You shall provide in a timely manner, full and safe access to your premises and data, and such office, computing and other facilities, as we request and as may be appropriate under the terms of the Proposal.

3.3 You shall provide in a timely manner such information as we may request, and ensure that such information is accurate in all material respects.

3.4 It shall be your responsibility to ensure that in the course of and as a result of the provision of the Products and the Services, all appropriate patient care and health and safety best practice, guidance, legislation and regulation are complied with, and if there are changes in personnel and/or working practice, that all appropriate consultations with, and approvals of, employees, representatives and trade unions are sought and made.

3.5 If the performance of our obligations under the Contract is prevented or delayed by any act or omission of you or your agents, sub-contractors or employees, you shall be liable to pay to us on demand all reasonable costs, charges, expenses or losses sustained or incurred by us (including, without limitation, any direct or indirect consequential losses, loss of profit and loss of reputation, loss or damage to property, injury to or death of any person and loss of opportunity to deploy resources elsewhere), subject to our confirming such costs, charges and losses to you in writing.

3.6 You understand that it is your responsibility to use the Products in the way and for the purposes intended and participate in any initiatives and projects with which we are involved, in accordance with the guidance we give you. You also understand that any results attained by you are dependent on your level of commitment and involvement to the mandated 12 month approach and journey and are not a reflection of the effectiveness of the Products or Services.

3.7 You and all other staff at the Trust may only use LiA Navigator for the purposes for which it is intended as set out in the Proposal/Arrangement Letter and in accordance with Optimise's Website Terms of Use Policy from time to time, and in particular shall not be entitled to allow any other than the users specified by Optimise (and granted access via user ids and passwords) to access it or to copy, replicate or reproduce all or any part of LiA Navigator, without Optimise's consent in writing. At no point under the contract may the contents of the LiA Navigator or access to it be provided by anyone at the Trust to any other Trust or organisation through the use of user ids and passwords set up for the use of designated individuals at your Trust.

3.8 In order to enable access to the LiA Navigator for Trust users, the web-based product requires the following minimum technical requirements to be met by each of the users:

- (a) a working personal computer with adequate internet connection;
- (b) a functioning web-browser installed with the minimum of either Windows Internet Explorer 6 (or later versions of Windows Internet Explorer), or Mozilla Firefox 1.0 (or later versions of Mozilla Firefox).

#### **4. Change Control**

4.1 If either party requests a change to the scope or execution of the Services, we shall within a reasonable time, provide a written estimate to you of:

- (a) the likely time required to implement the change;
- (b) any variations to our charges arising from the change;
- (c) the likely effect of the change on the Services; and
- (d) any other impact of the change on the terms of the Contract.

4.2 If we request a change to the scope of the Services, you shall not unreasonably withhold or delay consent to it.

4.3 If you wish for us to proceed with the change, we have no obligation to do so unless and until the parties have agreed in writing on the necessary variations to our charges and any other relevant terms of the Contract, to take account of the change.

#### **5. Charges and payment**

5.1 The prices, fees and charges (as appropriate for the provision of the Products and/or performance of the Services) are set out in the Proposal/Arrangement Letter and are stated exclusive of VAT (or similar tax), which shall be payable in addition at the appropriate rate, by you, in advance of the provision of the products and services under the contract.

5.2 In addition, but only where there is specific reference to such costs in the proposal/arrangement letter, you shall pay the cost of hotel, subsistence, travelling and any other ancillary expenses reasonably incurred by our personnel in connection with the Services, and the cost of any materials or services reasonably and properly provided by third parties required by us for the supply of the Services. Such expenses, materials and third party services shall be invoiced by us at cost.

5.3 Without prejudice to any other right or remedy that we may have, if you fail to pay us by the due date we may:

- (a) charge interest on such sum from the due date for payment at the annual rate of 4% above the base lending rate from time to time of the Bank of England, accruing on a daily basis and being compounded quarterly until payment is made, whether before or after any judgment - we may claim interest under the Late Payment of Commercial Debts (Interest) Act 1998; and
- (b) suspend all Services until payment has been made in full.

5.4 Time for payment shall be of the essence of the Contract.

5.5 All payments payable to us under the Contract shall become due immediately on termination of the Contract, despite any other provision. This condition is without prejudice to any right to claim for interest under the law, or any such right under the Contract.

5.6 We may, without prejudice to any other rights we may have, set off any liability of yours to us against any liability of ours to you.

## **6. Intellectual Property Rights**

6.1 Title to and copyright in the Products and any material, methodology, notes and other written material, trademarks, graphical images and logos provided by us, or created by us - with or without the direct or indirect involvement and input from your staff or other agents employed by you contributing to such materials - during the Contract period for the purposes covered by the Services, whether on our website or in the material published on it, or in relation to the Products and Services, shall at all times belong to and be the property of us. No rights of title or ownership are transferred, inferred or otherwise acquired. International copyright law and treaties protect all proprietary and design rights and other intellectual property in this material.

6.2 You may not make any other copies in whole or in part, for any purpose, without our express written permission. You shall take all reasonable measures to safeguard our Intellectual Property Rights and such measures shall be consistent with those that you would use to safeguard your own intellectual property.

6.3 You shall not reproduce, store, retain, distribute, modify, copy, transmit or make any other use of the documentation in whole or in part in any form or media without our express permission in writing.

6.4 Any agreed reproduction, storage, retention, distribution, modification, copying or transmission or any other use of any documentation in whole or in part in any form or media must reference Optimise Limited as the Intellectual Property Right owners, and the originators and creators of all of our IP and approaches, including reference to Listening into Action™, LiA™, LiA Navigator™, Optimal Framework™, Optimal Series™ and all constituent products and services forming part of these materials.

6.5 Any external communication produced by you, or any members of your staff, or agents working on your behalf, regarding Listening into Action during or after the initial twelve month licence period must explicitly and visibly include direct reference to Optimise Limited at all times as the architects and owners of the approach, all trade marks and associated brands.

6.6 Your use of our Website and any Website Products to which we agree to give you access as part of the Contract, shall be subject to our Website Terms of Use which is or shall be available on our Website. By accessing or using our Website in any way, you shall be deemed to have read, accepted and agreed to be bound by our Website Terms of Use.

6.7 Any breach of this condition 6 shall incur a right of immediate termination in accordance with condition 9.3.

## **7. Confidentiality and Publicity**

7.1 You 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 you by us or our agents, and any other confidential information concerning our business or our products or services which you may obtain. You shall restrict disclosure of such confidential material to such of your employees, agents or sub-contractors as need to know it for the purpose of discharging your obligations to us, and shall ensure that such employees, agents or sub-contractors are subject to obligations of confidentiality corresponding to those which bind you.

7.2 Unless otherwise specifically agreed by us, all materials, equipment and tools, drawings, specifications and data supplied by us to you, or created by us in whole or in part during the Contract period, shall at all times be and remain the exclusive property of us.

7.3 We shall be entitled to publicise on our website, and/or by press announcement or press article or otherwise, information about the Contract and our work on the Project, provided always we obtain the prior approval of the relevant text by you (such approval not to be unreasonably withheld or delayed).

7.4 We shall handle data provided by you in accordance with our Privacy and Data Protection Policies and comply with our obligations under the Data Protection Act 1998. A copy of our Privacy Policy is available on our Website.

7.5 This condition 7 shall survive termination of the Contract, however arising.

## 8. Limitation of liability

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

- (a) any breach of the Contract;
- (b) any use made by you of the Services, the Products or any part of them; and
- (c) any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Contract.

8.2 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.

8.3 The material displayed on our site is provided without any guarantees, conditions or warranties as to its accuracy. Any liability for any direct, indirect or consequential loss or damage incurred by any user in connection with our site or in connection with the use, inability to use, or results of the use of our site, any websites linked to it and any materials posted on it.

8.4 Nothing in these conditions excludes our liability:

- (a) for death or personal injury caused by our negligence; or
- (b) for fraud or fraudulent misrepresentation.

8.5 Subject to condition 8.2 and condition 8.3: we shall not be liable, whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation or otherwise for: loss of profits or business; or depletion of goodwill or loss of anticipated savings; or loss of contract; or loss of use; or loss or corruption of data or information; or any special, indirect, consequential or pure economic loss, costs, damages, charges or expenses

8.6 Our 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 lesser of £500,000, or the fees paid for the Products and/or Services under the Contract.

## 9. Termination

9.1 The Contract shall commence on the earlier of written acceptance by you of the Proposal/Arrangement Letter and the relevant date specified in the Proposal/Arrangement Letter and, subject to the termination provisions in the Contract, shall continue until the Project is completed and all payments due to us have been paid in full.

9.2 Without prejudice to any other rights or remedies to which the parties may be entitled, either party may terminate the Contract without liability to the other:

(a) save in the case of Contracts for a specified period, by giving not less than one month's written notice of termination to the other, or

(b) if the other party commits a material breach of the Contract and (if such a breach is remediable) fails to remedy that breach within 15 days of that party being notified in writing of the breach.

9.3 We may terminate this Contract immediately without notice in the event of any breach of condition 6 by you.

9.4 Termination of the Contract, however arising, shall not affect or prejudice the accrued rights of the parties as at termination (including for the avoidance of doubt payment to us for work done on the Project prior to termination) or the continuation of any provision expressly stated to survive, or implicitly surviving, termination.

9.5 Neither party shall (themselves or through any third party) for a period of at least six (6) months after completion or termination of the Project, canvass or solicit for direct or indirect employment or employ any employee of the other party.

## **10. Force Majeure**

Neither party shall have liability to the other under the Contract if it is prevented from, or delayed in, performing its obligations under the Contract or from carrying on its business by acts, events, omissions or accidents beyond its reasonable control.

## **11. Severance**

11.1 If any provision of the Contract is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

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

## **12. No Partnership or Agency**

Nothing in the Contract is intended to or shall operate to create a partnership between the parties, or to authorise either party to act as agent for the other, and neither party shall have authority to act in the name or on behalf of or otherwise to bind the other in any way (including but not limited to the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

### 13. 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.

### 14. Notices

Any notice under the Contract shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other party at its address as set out in the Contract, or such other address as may have been notified by that party for such purposes. A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not during business hours, at 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.

### 15. Governing Law

The Contract and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of England.

### 16. Definitions

In these terms and conditions:

“**Contract**” means any Proposal/Arrangement Letter, produced by us and accepted by you, any Special Conditions attached thereto and these conditions;

“**Client**” means the person, organisation, or company who purchases Products and/or Services from us;

“**Listening into Action Lead**” means a key individual appointed by – and working to - the client CEO, or similar senior executive lead for the Listening into Action work, identified or appointed in accordance with condition 3.1;

“**Products**” means all products and materials developed and/or supplied by us as part of the Contract in any media, including, without limitation, computer programmes, data, diagrams, reports and recommendations (including drafts);

**“Intellectual Property Rights”** means patents, rights to inventions, copyright and related rights, trade marks, trade names, domain names, graphical images, logos, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered, and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world;

**“Optimise”** means Optimise Limited, a company registered in England and Wales under company number 04539705, with a registered office at c/o Shoosmiths LLP, Witan Gate House, 500-600 Witan Gate West, Milton Keynes, MK9 1SH

**“Proposal”** means our proposal, arrangement letter or similar, setting out the Products and Services to be provided by us under the Contract and matters relative thereto;

**“Services”** mean the services to be provided by us under the Contract; and

**“Website”** means [www.optimiselimited.co.uk](http://www.optimiselimited.co.uk), any related sites providing access to LiA Navigator, and all other sites operated and owned by Optimise

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