

ETCOM Postural Ergonomics Limited – Terms and Conditions of Service

1. Definitions and Interpretation

1.1 In these Conditions the following words shall have the following meanings:

"Client"	means the purchaser of the Services from ETCOM;
"Contract"	means the Conditions and ETCOM's Order Confirmation;
"Due Date"	means 30 days after the date of invoice
"Intellectual Property"	means all intellectual property rights including (without limitation) trade marks, trade names, patents, copyright, design right and any right in any inventions, designs, processes, methodologies, concepts or techniques belonging to ETCOM or which ETCOM is authorised to use;
"Order Confirmation"	means the order confirmation provided to the Client by ETCOM for the provision of the Services and which includes any contractual terms specific to the Client;
"the Price"	means the overall cost (exclusive of VAT) charged by ETCOM for the Services in accordance with the Contract; and
"the Services"	means those Services listed on the Order Confirmation and any other services to be provided by ETCOM as agreed in writing from time to time.

1.2 The Conditions supersede all earlier sets of terms and conditions and apply to every contract made between ETCOM and the Client for the supply of Services.

1.3 In the event of a conflict between the Conditions and any terms set out in the Order Confirmation, the Order Confirmation shall prevail.

2. Contract

2.1 ETCOM will supply the Services in accordance with the Contract. No dealer, agent or representative of ETCOM appointed by or representing ETCOM is authorised to create a contract or make a commitment on behalf of ETCOM save in accordance with the Conditions.

2.2 Any price quoted by ETCOM in advance of an Order Confirmation shall be an estimate only and shall not constitute an offer to the Client capable of being accepted. The Contract shall be formed upon ETCOM's supply of an Order Confirmation to the Client and ETCOM will only be bound to supply Services for which it has provided an Order Confirmation.

2.3 Failure or neglect by ETCOM to enforce at any time any of the provisions of the Contract shall not be construed nor shall it be deemed to be a waiver of ETCOM's rights hereunder.

2.4 Any notice required to be given by either party under the Conditions shall be in writing addressed to the other party at its registered office or such other address as may have been notified.

2.5 ETCOM shall not be liable for any delay in performing any obligations under the Contract if such delay is due to circumstances beyond its reasonable control and ETCOM shall be entitled (subject to giving the Client reasonable particulars of the circumstances and to using its reasonable endeavours to resume full performance without avoidable delay) to such extension of time for the performance of such obligations as may be necessary.

2.6 The Contracts (Rights of Third Parties) Act 1999 shall not apply to the Contract and unless specific provision is made in the Contract to the contrary, no person other than the parties to it shall have any rights under it or be entitled to enforce it.

2.7 The Contract shall be governed by English law and the parties submit to the non-exclusive jurisdiction of the English Courts.

2.8 If any provision of the Contract is held by a competent court to be invalid or unenforceable in whole or in part, the validity of the other provisions and the remainder of the provision in question shall not be affected and shall remain valid and enforceable.

2.9 The Contract shall constitute the whole contract between the parties and no previous negotiations, quotations, correspondence or other communication prior to the date of the issue of the Order Confirmation shall form part of the Contract.

3. The Services

3.1 In order to enable ETCOM's representatives to perform the Services the Client undertakes, where necessary, to:-

3.1.1 provide ETCOM's representatives with full safe access to the Client's premises and adequate working space;

3.1.2 make available to ETCOM's representatives, free of charge, all facilities and services reasonably requested by ETCOM's representatives to enable them to perform the Services;

3.1.3 bring all relevant security and health and safety rules and procedures to the attention of all ETCOM's representatives attending the Client's premises; and

3.1.4 provide ETCOM's representatives (at the Client's cost) at anytime with any advice and information on, and assistance with, its own products and/or equipment used by the Client which ETCOM considers necessary to perform the Services.

3.2 If the Client does not allow or fails to take all steps within its power to facilitate the commencement or completion of ETCOM's provision of the Services payment shall become due as if the Services have commenced or been completed as the case may be. A notice from ETCOM to the Client confirming the date that the Services would have commenced or been completed on a particular date shall be conclusive evidence to that effect.

3.3 The Client will indemnify ETCOM against:

3.3.1 any liability which ETCOM may have to any of its representatives who are engaged in providing the Services as a result of the negligence of the Client, its staff or agents and/or as a result of the Client's breach of contract; and

3.3.2 any damage which ETCOM might suffer as a result of a breach of this clause 3.

4. Prices, Charges and Payment

4.1 Unless otherwise stated all estimates and Prices given are exclusive of VAT.

4.2 All sums due to ETCOM from the Client under the Contract shall be paid without any set-off or counterclaim.

4.3 Unless otherwise stated in the Order Confirmation, the Price shall be paid by the Client to ETCOM within 30 days of invoice to be submitted upon completion of the Service if the Service takes place within a four week period or within 30 days of each invoice submitted monthly should the Service exceed a four week period.

4.4 ETCOM may provide services or goods through a third party additional to those included in the Services. In such circumstances ETCOM shall act as agents of the Client and only on the basis that no liability of any kind shall attach to ETCOM.

4.5 If payment remains outstanding after the Due Date, ETCOM may suspend the provision of the Services in respect of this Contract or any other contract between ETCOM and the Client, and/or:

4.5.1 will exercise its statutory right to interest under the Late Payment of Commercial Debts (Interest) Act 1998, and will claim, in respect of any amounts outstanding for more than 45 days, daily interest at the rate of 8% over base.; and/or

4.5.2 terminate the Contract in whole or in part and seek to recover damages for breach of contract.

4.6 ETCOM reserves the right to amend the Price to correct errors or omissions and to alter the Price prior to the Event in respect of increases in costs, or any other unforeseen event beyond ETCOM's control.

4.7 If the Client requires any alteration to the Services ordered after the supply of the Order Confirmation by ETCOM, ETCOM shall be entitled to increase the Price accordingly.

4.8 Should the Client become insolvent, be unable to pay its debts, commit any act of bankruptcy, go into liquidation, have a receiver appointed or make any voluntary arrangement with its

creditors or suffer any similar action to be taken then ETCOM may suspend the provision of the Services.

4.9 Any legal costs, expenses or charges incurred by ETCOM in recovering any outstanding payments shall be paid by the Client on a full indemnity basis.

5. Cancellation and Postponement

5.1 All cancellations must be made by the client in writing.

5.2 If the Service is cancelled for whatever reason by the Client more than 25 working days before the start date of the Event, the Client shall be liable for 50% of the agreed fee and the Client will fully indemnify ETCOM for all and any costs and charges incurred as a result of the cancellation.

5.3 If the Service is cancelled for whatever reason by the Client less than 25 working days prior to the start date, the Client shall remain liable to pay to ETCOM the full Price and will fully indemnify ETCOM for all and any costs and charges incurred by ETCOM as a result of the cancellation.

5.4 In the event of a postponement of the Service by the Client for whatever reason, an administration charge of not more than 50% of the Price may be made by ETCOM and the Client will fully indemnify ETCOM for any costs incurred as a result of the postponement.

5.5 Should the Service be cancelled by ETCOM a refund will only be payable by ETCOM in respect of monies already received by ETCOM and where applicable to the extent that it is able to obtain a refund from third parties.

6. Warranties

6.1 Save as expressly provided in the Contract all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law. By accepting the Conditions the Client acknowledges that it accepts the terms, conditions and warranties set out in this document in lieu of all implied terms, conditions and warranties.

6.2 ETCOM cannot guarantee and does not warrant that the Service will take place on the date or dates agreed, or at all.

6.3 ETCOM warrants that the Services shall be provided with all reasonable care and skill. Whilst ETCOM will use its reasonable endeavours to deliver the services in accordance with the Contract, it reserves the right to alter the Services for any reason which in its absolute discretion it considers necessary but undertakes to coordinate where reasonably possible with the Client.

6.4 Any claim for breach of warranty must be notified to ETCOM within 7 days of discovery of the breach and no later than 7 days following the Service.

6.5 ETCOM shall be under no liability under the warranty in clause 6.3 (or any other warranty, condition or guarantee) if the Price has not been paid in accordance with the payment terms set out in clause 4.

6.6 The benefit of the warranties contained in this clause 6 shall enure only for the benefit of the Client and shall not be assigned, transferred or otherwise dealt with.

7. Liabilities

7.1 The purpose of this clause is to limit ETCOM's exposure to unquantifiable risk and to restrict it as far as practically possible to the terms of ETCOM's insurance policy. The Client agrees to take out their own comprehensive insurance policy in addition to ETCOM's.

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

7.2.1 any breach of these conditions; and

7.2.2 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract

7.3 Nothing in these conditions excludes or limits the liability of the Company for death or personal injury caused by ETCOM's negligence.

7.4 Subject at all times to the limitations set out below ETCOM shall indemnify the Customer and keep the Customer fully and effectively indemnified against injury to or death of any person caused by any negligent act or omission or wilful misconduct of ETCOM, its employees, agents or sub-contractors.

7.5 The Client shall indemnify ETCOM and keep ETCOM fully and effectively indemnified against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Client, its employees, agents or sub-contractors.

7.6 The description of the Services shall be as set out in the Company's quotation which shall form part of this contract.

7.7 All drawings, descriptive matter, specifications and advertising issued by the Company and any descriptions or illustrations contained in the Company's catalogues, brochures or other sales literature are issued or published for the purpose of description only and do not form part of this Contract nor are they given as warranties.

7.8 Save as provided in clause 7.3 above, ETCOM's total liability in contract, tort (including negligence or breach of statutory duty), restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall not exceed £500,000 subject to the terms of this limitation clause. To the extent that either party has a valid claim against the other the amount of any claim shall be reduced by an amount that is equivalent to any payment that is recovered under any relevant insurance policy under which the party claiming is covered.

7.9 ETCOM shall not be liable to the Client for any direct or indirect or consequential loss or damage (whether for economic loss, loss of profits, business operating time or otherwise), costs, expenses or other claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the provision of the Services except as expressly provided in these Conditions.

7.10 The Client acknowledges that it does not rely on, and waives any claim for breach of, any representation which is not confirmed in writing.

8. Intellectual Property Rights

8.1 Nothing in the Contract shall be construed as assigning to the Client or granting the Client any interest in any Intellectual Property Rights in the Services and the Client shall not at any time in any way question or dispute the ownership by ETCOM or any other party of the Intellectual Property Rights.

8.2 Any Intellectual Property Rights which are created or contributed to by ETCOM in the course of providing the Services to the Client (including modifications proposed by the Client) shall belong to ETCOM and the Client acknowledges that it shall have no right or interest in such Intellectual Property Rights.

8.3 ETCOM shall retain copyright in all artwork and other material which ETCOM creates.

8.4 The Client will not acquire any intellectual property rights in that artwork or material and the Client will not be entitled to use it in any other form or in any other media without ETCOM's prior consent.

9. Waiver and Remedies

9.1 The failure to exercise or delay in exercising a right or remedy provided by this agreement or by law does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. A waiver of a breach of any of the terms of this agreement or of a default under this agreement does not constitute a waiver of any other breach or default and shall not affect the other terms of this agreement. A waiver of a breach of any of the terms of this agreement or of a default under this agreement will not prevent a party from subsequently requiring compliance with the waived obligation. The rights and remedies provided by this agreement are cumulative and (subject as otherwise provided in this agreement) are not exclusive of any rights or remedies provided by law.

10. Force Majeure

10.1 In this agreement, "force majeure" shall mean any cause preventing either party from performing any or all of its obligations which arises from or is attributable to either acts, events, omissions or accidents beyond the reasonable control of the party so prevented including without limitation strikes, lock-outs or other industrial disputes (whether involving the workforce of the party so prevented or of any other party), 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, or storm or default of suppliers or sub-contractors or war, civil war, armed conflict or terrorist attack, nuclear, chemical or biological contamination or sonic boom, but nothing else.

10.2 If either party is prevented or delayed in the performance of any of its obligations under this agreement by force majeure, that party shall forthwith serve notice in writing on the other party specifying the nature and extent of the circumstances giving rise to force majeure, and shall, subject to service of such notice and having taken all reasonable steps to avoid such prevention or delay and to clause 10.4, have no liability in respect of the performance of such of its obligations as are prevented by the force majeure events during the continuation of such events, and for such time after they cease as is necessary for that party, using all reasonable endeavours, to recommence its affected operations in order for it to perform its obligations.

10.3 If either party is prevented from performance of its obligations for a continuous period in excess of six months, either party may terminate this agreement forthwith on service of written notice upon the party so prevented, in which case neither party shall have any liability to the other except that rights and liabilities which accrued prior to such termination shall continue to subsist or if appropriate, provide for any specific provisions which are to be saved and/or specify whether payments are to be made for goods or services already delivered or rendered, or goods not paid for are to be returned, or compensatory payments are to be made.

10.4 The party claiming to be prevented or delayed in the performance of any of its obligations under this agreement by reason of force majeure shall take use reasonable endeavours to bring the force majeure event to a close or to find a solution by which the agreement may be performed despite the continuance of the force majeure event.

11. Language

11.1 This agreement is drawn up in the English language. If this agreement is translated into another language, the English language text shall in any event prevail.

12. No Partnership / Agency

12.1 Nothing in this agreement 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. Variation

13.1 No variation of this agreement or of any of the documents referred to in it shall be valid unless it is in writing and signed by or on behalf of each of the parties.

14. Severance

14.1 If any provision of this agreement shall be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this agreement which shall remain in full force and effect.

14.2 If any provision of this agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid and enforceable.

14.3 The parties agree, in the circumstances referred to in clause 14.1 and if sub-clause 14.2 does not apply, to attempt to substitute for any invalid or unenforceable provision a valid and enforceable provision which achieves to the greatest extent possible the same effect as would have been achieved by the invalid or unenforceable provision. The obligations of the parties under any invalid or unenforceable provision of this agreement shall be suspended while an attempt at such substitution is made.

15. Rights of Third Parties

15.1 Save as expressly provided in this agreement, no term of this agreement shall be enforceable by a third party (being any person other than the parties and their permitted successors and assignees).

16. Governing Law and Jurisdiction / Arbitration

16.1 This agreement shall be governed by and construed in accordance with the law of England.

16.2 Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.

Didcot
January 2004