

# THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED

## TERMS & CONDITIONS FOR USER PERMISSIONS

### 1. Definitions and Interpretation

- 1.1. The following definitions and rules of interpretation apply to these terms and conditions and may be changed from time to time:
- 1.1.1. **"Agreement(s)"** means the agreement or agreements entered into between SDS and the Contracting Party containing terms and conditions or other rules applicable to either (i) services being provided to SDS by the Contracting Party, or as applicable, (ii) a project being undertaken by the Contracting Party for which SDS is contributing funding;
- 1.1.2. **"Charges"** means the charges payable by the Contracting Party to SDS for each User Permission made available to the Contracting Party;
- 1.1.3. **"Contracting Party"** means the party with whom SDS contracts under the Agreement(s), identified in the User Permission Application Form and **"Contracting Parties"** shall be construed accordingly;
- 1.1.4. **"Customer Data"** means all data, including all text, sound, software, image or video files that are provided to Microsoft by the Contracting Party, or on behalf of the Contracting Party through use of Online Services;
- 1.1.5. **"Effective Date"** means the date specified in the User Permission Application Form as the commencement date of the User Permission, as approved and accepted by SDS;
- 1.1.6. **"FIPS"** means the financial information processing system used by SDS;
- 1.1.7. **"Guidelines"** means the User Permission application form guidelines available on Provider Central (as updated by SDS from time to time);
- 1.1.8. **"Microsoft Agreements"** means the agreements entered into between Microsoft and SDS in relation to the terms of grant of Microsoft product licences by Microsoft to SDS (including but not limited to the User Permissions) dated 29 April 2016;
- 1.1.9. **"Online Services"** means the Microsoft Dynamics CRM online services products that SDS requires Contracting Parties to have access to, to enable FIPS to be fully operational (as determined by SDS from time to time), a list of which is set out in the Guidelines;
- 1.1.10. **"Product Terms"** means the document(s) (applicable at the date of purchase by SDS of the relevant Microsoft product(s), which date shall be confirmed to the Contracting Party by SDS) providing information about the terms of use of Microsoft products (including Microsoft's online services terms) which are available at <http://www.microsoft.com/licensing/DocumentSearch.aspx?Mode=3&DocumentTypeId=53&Language=1> (as updated by Microsoft from time to time);
- 1.1.11. **"SDS"** means The Skills Development Scotland Co. Limited (SC202659) having its registered office at Floor 1 Monteith House, 11 George Square, Glasgow G2 1DY;
- 1.1.12. **"Software"** means the Microsoft Dynamics CRM software products that SDS requires Contracting Parties to have access to, to enable FIPS to be fully operational (as determined by SDS from time to time), a list of which is set out in the Guidelines;
- 1.1.13. **"T&Cs"** means the terms and conditions set out in this document, as may be amended from time to time;
- 1.1.14. **"Trade Secret"** means information that is not generally known or readily ascertainable to the public, has economic value as a result and has been subject to reasonable steps under the circumstances to maintain its secrecy;
- 1.1.15. **"Use Rights"** means (i) in the case of Software, the prescribed use rights and terms applicable to each Software product set out and/or referred to by Microsoft in the Product Terms and/or (ii) in the case of Online Services, the prescribed use rights and terms applicable to each of the Online Services products set out and/or referred to by Microsoft in the Product and which for the avoidance of doubt include Microsoft's online services terms which are referred to and can be accessed therein (or as otherwise indicated by Microsoft and/or SDS from time to time);
- 1.1.16. **"User Permission"** means (i) the right to download, install, access and use the Software and (ii) the right to access and use the Online Services, subject to these T&Cs and the Use Rights;
- 1.1.17. **"User Permission Application Form"** means the application form submitted by or on behalf of the Contracting Party, requesting assignments by SDS of a User Permission for each named individual in the application form;
- 1.2. A **"person"** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.3. Unless otherwise specified, a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time and shall include all subordinate legislation made from time to time under that statute or statutory provision and all orders, notices, codes or practice and guidance made under it.
- 1.4. A reference to **"writing"** or **"written"** includes faxes but not email.
- 1.5. Any phrase introduced by the terms **"including"** or **"include"** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 1.6. Any obligation in these T&Cs on a person not to do something includes an obligation not to agree or allow that thing to be done.
- 1.7. A reference to a document is a reference to that document as varied or amended from time to time.
- 1.8. References to clauses and schedules are to the clauses and schedules of these T&Cs. Clause and schedule headings shall not affect the interpretation of these T&Cs.
- 1.9. The schedules form part of these T&Cs and shall have effect as if set out in full in the body of these T&Cs. Any reference to these T&Cs includes the schedules.
- 1.10. Unless the context otherwise requires, words in the singular shall include the plural and the plural shall include the singular.

### 2. Assignment

- 2.1. Any assignment under clause 2.3 shall be subject to (i) the Contracting Party completing and submitting the User Permission Application Form in accordance with the process outlined in the Agreement(s) and/or Guidelines, available through the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/> and (ii) SDS accepting and approving the User Permission request in the User Permission Application Form (and not subsequently withdrawing such approval).
- 2.2. The Contracting Party agrees that the submitting of a User Permission Application Form through the process outlined in the Agreement(s) and/or Guidelines constitutes acceptance of these T&Cs by the Contracting Party, its employees, agents and sub-contractors (if any).
- 2.3. Subject to clause 2.1 SDS assigns its benefit to the User Permission(s) (in the number specified in the User Permission Application Form approved by SDS) to the Contracting Party with effect from the Effective Date (the **"Assignment"**).
- 2.4. The Contracting Party:
- 2.4.1. agrees to comply with and perform all of the obligations under these T&Cs and the Use Rights (and procure, and be responsible for, the compliance and performance of all such obligations by its employees, agents and/or sub-contractors) from the Effective Date;
- 2.4.2. undertakes not to act in a way that would or would be likely to cause SDS to breach any of its obligations under the Use Rights; and
- 2.4.3. agrees to only use (and to procure that where relevant its employees, agents and/or sub-contractors only use) the User Permission for the purposes of fulfilment of the Contracting Party's obligations under, and in accordance with, the Agreement(s), under authorised SDS programme(s) and in accordance with any and all relevant requirements of law (including European Community Law) and such guidance and instructions relating to FIPS as SDS provides from time to time through the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/fips-funding-information-and-processing-system/> including the Guidelines, and for no other purposes whatsoever.

### 3. Duration of Assignment and T&Cs

54765481-1

- 3.1. Subject to clause 3.2, these T&Cs and the Assignment will commence on the Effective Date and shall remain in effect for 12 months unless SDS specifies a shorter term of assignment (the **"Term"**).
- 3.2. Notwithstanding clause 3.1:
- 3.2.1. the Contracting Party acknowledges that SDS is using Microsoft software for FIPS and bound by Microsoft's licence cycle terms and contractual arrangements so SDS may be required, and shall be entitled, to suspend and/or terminate, without liability, the Assignment and/or these T&Cs and/or the User Permission in respect of any particular SDS programme(s), prior to the end of the Term, without cause;
- 3.2.2. the Assignment and these T&Cs shall terminate on the expiry of the Agreement(s) unless a replacement agreement (agreed between the parties) immediately replaces such expired Agreement(s) for the remaining period of the Term and the Contracting Party completes and submits a User Permission Application Form in accordance with these T&Cs (and any other instructions as SDS may issue); and
- 3.2.3. SDS shall be entitled to terminate the Assignment and these T&Cs without liability, on termination by SDS of the Agreement(s) or any part thereof (or on termination by SDS of any other contract between the Contracting Party and SDS) due to breach by the Contracting Party and to exercise its rights in terms of these T&Cs in relation to termination.
- 3.3. If the Contracting Party (or its employees, agents and/or sub-contractors) is in breach of the terms of these T&Cs, or in SDS' reasonable opinion is likely to breach the terms of these T&Cs SDS shall be entitled (at its entire discretion) to (i) immediately suspend the Assignment; (ii) terminate the Assignment and these T&Cs with immediate effect and/or (iii) treat such breach as a material breach of the Agreement(s) (or any part thereof) (and/or any other contract between the Contracting Party and SDS) and to exercise its rights in terms of the Agreement(s) (and/or any other contract between the Contracting Party and SDS) in relation to its termination.
- 3.4. Unless otherwise advised by SDS, the User Permission shall be automatically reassigned to SDS on termination and/or expiry of the Assignment and these T&Cs (including where the Contracting Party requests termination or cessation of a User Permission) and the Contracting Party shall disable access to the Software and Online Services promptly and in accordance with such instructions as may be provided by SDS or its agents and shall, if requested by SDS, provide SDS with written confirmation that this has been done.
- 3.5. For the avoidance of doubt (and without prejudice to clause 2.4.3) the Contracting Party shall (and procure that where relevant its employees, agents and/or sub-contractors shall) only use any assigned User Permission for the authorised SDS programme(s) under which the User Permission is approved (and not subsequently withdrawn) by SDS and for no other reason (including for any other SDS programme) and the Contracting Party acknowledges and agrees that SDS shall be entitled to terminate, suspend and/or remove from the Contracting Party, any User Permission in respect of any particular SDS programme, from time to time and prior to the expiry and/or termination of the Agreements, on reasonable notice from SDS (where reasonably practicable in the circumstances).

### 4. Conditions of Assignment

- 4.1. SDS warrants that it is entitled to assign each User Permission to the Contracting Party on and subject to the terms of these T&Cs.
- 4.2. The Contracting Party shall not and shall not attempt to, and shall procure that its employees, agents and/or sub-contractors shall not and shall not attempt to:
- 4.2.1. share the User Permission and/or provide the User Permission to anyone other than the individual named by the Contracting Party in the User Permission Application Form for the Term;
- 4.2.2. allow individuals accessing FIPS under a User Permission to share its login credentials with anyone else;
- 4.2.3. make any alterations or adaptations to any Microsoft product (including the Software and/or Online Services);
- 4.2.4. download or otherwise remove copies of software or source code from an Online Service;
- 4.2.5. reverse engineer, decompile or disassemble any Microsoft product (including the Software and/or Online Services);
- 4.2.6. install or use non-Microsoft software or technology in any way that would subject Microsoft's intellectual property or technology to additional obligations;
- 4.2.7. work around any technical limitations in any Microsoft product (including the Software or Online Services) or restrictions in the Use Rights, these T&Cs or any other applicable documentation;
- 4.2.8. separate and run parts of Microsoft products (including the Software or Online Services) on more than one device or under one User Permission; upgrade or downgrade parts of Microsoft products at different times or transfer parts of Microsoft products separately;
- 4.2.9. use any Microsoft products (including the Software or Online Services) to offer commercial hosting services to third parties;
- 4.2.10. use the Online Services (i) in a way prohibited by law, regulation, governmental order or decree; (ii) to violate the rights of others; (iii) to try to gain unauthorized access to or disrupt any service, device, data, account or network; (iv) to spam or distribute malware; (v) in a way that could harm the Online Service or impair anyone else's use of it; or (vi) in any application or situation where failure of the Online Service could lead to the death or serious bodily injury of any person, or to severe physical or environmental damage.
- 4.3. The Contracting Party shall:
- 4.3.1. obtain the assignment of a User Permission from SDS for each individual who shall access FIPS at any time on behalf of the Contracting Party, for the period of the Term, and specify each such individual in a User Permission Application Form;
- 4.3.2. be responsible for ensuring that only the designated authority (as further described in the Guidelines) for the relevant SDS programme or funded project requests any User Permission (and any reassignment or cessation of a User Permission) through the User Permission Application Form;
- 4.3.3. submit the User Permission Application Form to SDS by the date stated in the Contracting Party's relevant offer for the Agreement (even if none of the details in the User Permission Application Form have changed since previous submission);
- 4.3.4. submit the User Permission Application Form with details of the authorised user struck through and a specified termination date, in the event that the Contracting Party wishes to terminate the Assignment of a User Permission;
- 4.3.5. ensure that all information entered into and submitted in a User Permission Application Form is complete, accurate and up to date at all times;
- 4.3.6. monitor compliance of these T&Cs throughout the Term;
- 4.3.7. comply with all laws and regulations applicable to its use of Online Services and Software including laws relating to privacy, data protection and confidentiality of communications and be responsible for implementing and maintaining privacy protections and security measures for components that the Contracting Party provides or controls and for determining whether the Online Services are appropriate for storage and processing of information subject to any specific law or regulation;
- 4.3.8. be responsible for ensuring the security of each User Permission, Software and Online Services so as to prevent inappropriate or unauthorised use;
- 4.3.9. be solely responsible for any non-Microsoft software or technology that it installs or uses;
- 4.3.10. ensure that any security information to access the Software and Online Services allocated to the individual(s) named in the User Permission Application Form, as approved by SDS (the **"Authorised User(s)"**) (including without limitation all login and password details) is kept confidential and secure by each Authorised User at all times, and that the information is not accessible by, or disclosed to, anyone other than an Authorised User at any time;
- 4.3.11. immediately report to the Director of National Training Programmes, Skills Development Scotland (or such other contact as SDS may advise from time to time) details of any breach by the Contracting Party (or any of its employees, agents and/or sub-contractors) of these T&Cs; and
- 4.3.12. assist and cooperate with SDS and/or Microsoft to enable SDS to comply with its obligations under the Microsoft Agreements.

# THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED

## TERMS & CONDITIONS FOR USER PERMISSIONS

- 4.4. The Contracting Party acknowledges that SDS has a limited number of licences to use the Software and/or Online Services and therefore its ability to assign User Permissions to training providers is limited. The acceptance by SDS of a request by the Contracting Party for additional User Permissions (through a User Permission Application Form) shall be subject to additional charges and a lead in time. SDS reserves the right to refuse the Contracting Party additional User Permissions.
- 4.5. The Contracting Party acknowledges and accepts that:
- 4.5.1. Microsoft may modify or terminate an Online Service in any country or jurisdiction where there is any current or future government requirement or obligations that (1) subjects Microsoft to any regulation or requirement not generally applicable to business operating there, (2) presents a hardship for Microsoft to continue operating the Online Service without modification and/or (3) causes Microsoft to believe that the Online Services or the terms applicable to the Online Services may conflict with any such requirement or obligation;
- 4.5.2. Microsoft may make changes to its licensing programme that will make it necessary for SDS and/or the Contracting Party to enter into new agreements and/or terms and conditions;
- 4.5.3. Microsoft products (including the Software and Online Services) are protected by copyright and other intellectual property rights, laws and international treaties. Microsoft (1) does not transfer any ownership rights in any Microsoft products (including the Software and Online Services) and (2) reserves all rights not expressly granted.
- 5. Re-assigning User Permissions**
- 5.1. Subject to the reassignment restrictions set out in clauses 5.2 and 5.3, the Contracting Party (acting through its designated authority in accordance with the Guidelines) may request SDS to reassign the User Permission to another device or user (other than the individual named in the User Permission Application Form) by resubmitting the User Permission Application Form including details of the replacement user and associated details inserted, in accordance with the Guidelines. Acceptance and approval by SDS of a reassignment request from the Contracting Party shall be at SDS' sole discretion.
- 5.2. The Contracting Party acknowledges that a User Permission cannot be reassigned, and the Contracting Party shall not request for a User Permission to be reassigned by SDS, within 90 days of (i) the grant of that same User Permission by SDS and/or (ii) its reassignment, unless:
- 5.2.1. the reassignment is due to temporary reallocation to cover a user's absence or the unavailability of a device that is out of service; or
- 5.2.2. the reassignment is in respect of Software only and is due to permanent hardware failure or loss or termination of the initial user's employment or contract with the Contracting Party.
- 5.3. In the event that SDS approves reassignment of a User Permission, the Contracting Party shall promptly (i) where the reassignment relates to Software, remove the Software or block access from the former device or to the former user and/or (ii) where the reassignment relates to Online Services, block access and remove any related software from the former device or the former user's device.
- 5.4. Subject to clauses 5.1-5.3, the Contracting Party shall not assign or in any way transfer, dispose of, distribute, sub-license, rent, lease, license, lend, sub-contract or use the rights and/or obligations it assumes in relation to the User Permission, Software or Online Services for use by any other person or to any third party's IT systems (unless otherwise advised by SDS to do so).
- 6. IT Support Services**
- If the Contracting Party discovers a technical issue and/or problem with the Software and/or Online Services, or requires IT support of any kind in relation to the User Permission or would like further information and/or advice in relation to the Use Rights, the Contracting Party shall, as soon as is reasonably practicable, inform SDS via the online help form available through the Training Provider pages of the SDS website at [www.skillsdevelopmentscotland.co.uk](http://www.skillsdevelopmentscotland.co.uk)
- 7. Charges**
- 7.1. The Contracting Party shall pay SDS the charges for each User Permission in accordance with the Rules and Guidelines, as set out in the Training Provider pages of the SDS website at <https://www.skillsdevelopmentscotland.co.uk/for-training-providers/flips-funding-information-and-processing-system/>.
- 7.2. SDS shall be entitled to invoice the Contracting Party at any time following the Assignment of a User Permission to the Contracting Party.
- 7.3. The Contracting Party agrees to pay each such invoice within 30 days of the date of issue by SDS.
- 7.4. In the event that the Contracting Party fails to pay any invoice issued by SDS under this clause 7 (or part thereof) in accordance with the Agreement(s) and/or Guidelines, without prejudice to SDS' other rights and remedies, SDS shall be entitled to:
- 7.4.1. charge interest on the overdue amount at the rate of 4 per cent per annum above the base rate for the time being of the Royal Bank of Scotland plc accruing on a daily basis from the due date up to the date of actual payment; and/or
- 7.4.2. offset the shortfall against any sums due by SDS to the Contracting Party.
- 7.5. The Contracting Party may be entitled to a pro-rated reduction (pro-rated on a monthly basis) of the charges for a User Permission if a User Permission is terminated (other than as a result of breach by the Contracting Party (or its employees, agents and/or sub-contractors)) prior to the commencement of the final month of the Term, provided that the Contracting Party has complied fully with these T&Cs and the Guidelines. A reduction of the charges under this clause 7.5 shall be at the discretion of SDS acting reasonably.
- 8. Verifying Compliance**
- 8.1. The Contracting Party must keep accurate and complete records relating to all use of the Software and/or Online Services by the Contracting Party (including its employees, agents and/or sub-contractors) and agrees that SDS and/or Microsoft shall be entitled to verify the Contracting Party's compliance with these T&Cs and/or the Use Rights during normal business hours and in a manner that does not interfere unreasonably with the Contracting Party's obligations under the Agreement(s).
- 8.2. The Contracting Party shall (and shall procure that its employees, agents and/or sub-contractors shall) (i) cooperate with and/or assist SDS, Microsoft and/or any independent auditor engaged to carry out a verification of SDS and/or the Contracting Party; (ii) promptly provide the verifying party with any information reasonably requested in furtherance of such verification including without limitation access to systems running the Software and/or Online Services and evidence of User Permissions; and/or (iii) complete, and/or assist SDS in completion of, any self-audit process (including without limitation Microsoft's self-audit process which Microsoft may require as an alternative to a third party audit for the purposes of determining compliance).
- 8.3. Without prejudice to any other rights SDS has under these T&Cs (including suspension and/or termination of the Assignment for breach) if any verification reveals any unlicensed use or distribution, then (subject to any other requirement or instruction by Microsoft or SDS) within 30 days, (1) the Contracting Party must obtain, and pay SDS for, sufficient User Permissions from SDS (the cost of which shall be confirmed by SDS at that time) and (2) reimburse SDS for any costs SDS incurred in relation to verifying the Contracting Party's compliance, including without limitation (i) any costs SDS is required to pay and/or reimburse Microsoft in connection with Microsoft's verification of SDS or the Contracting Party and/or (ii) any charges in connection with SDS being required to obtain additional licenses (or otherwise) from Microsoft.
- 9. Privacy**
- 9.1. The Contracting Party consents to the processing of personal information by Microsoft, SDS and its agents in relation to the User Permission and will obtain all required consents from third parties including without limitation employees and programme/project participants under applicable privacy and data protection law before providing personal information to Microsoft and/or SDS.
- 9.2. The Contracting Party acknowledges that:
- 9.2.1. personal information collected by Microsoft in relation to the Contracting Party's use of the User Permission (1) may be transferred, stored and processed in the United States or any other country in which Microsoft or its contractors maintain facilities; and
- 9.2.2. Microsoft products (including the Software and Online Services) are subject to U.S. export jurisdiction. Where applicable the Contracting Party must comply with all applicable international and national laws, including the U.S. Export Administration Regulations, the International Traffic in Arms Regulations and end-user, end use
- and destination restrictions by U.S and other governments related to Microsoft products, services and technologies.
- 10. Indemnities**
- 10.1. SDS agrees that in the event that (i) it considers, acting reasonably, the Software and/or Online Services to be no longer fit for purpose or (ii) SDS is required to terminate or suspend the Assignment to the Contracting Party, due to Microsoft's termination or suspension of the Microsoft Agreements (or any part thereof) with SDS, without cause, it shall be entitled, at SDS' entire discretion, to provide the Contracting Party with an alternative process to enable the Contracting Authority to store and submit the required data to SDS for the remainder of the Term at no additional charge. Use of such alternative process shall be subject to such reasonable additional terms and guidance as SDS may advise.
- 10.2. The Contracting Party shall indemnify, keep indemnified and hold harmless SDS against any and all liabilities, costs, expenses, damages and losses that SDS suffers or incurs from and including the Effective Date as a result of the Contracting Party's failure (or the failure of the Contracting Party's employees, agents and/or sub-contractors) to perform or satisfy the obligations it assumes under these T&Cs, except to the extent that such losses, damages or costs arise as a result of SDS' failure to perform or satisfy its obligations in relation to the User Permission prior to the Effective Date.
- 10.3. Subject to clause 10.4, SDS shall indemnify, keep indemnified and hold harmless the Contracting Party against any and all liabilities, costs, expenses, damages and losses that the Contracting Party suffers or incurs from and including the Effective Date as a result of a breach by SDS of the warranty under clause 4.1.
- 10.4. The entire liability in any year of SDS to the Contracting Party, under these T&Cs, whether in contract, delict (including negligence or breach of statutory duty) or otherwise, arising out of or in connection with these T&Cs shall be limited to an amount equal to 100% of the Charges paid or payable to SDS for the User Permission(s) by the Contracting Party in that Year.
- 10.5. Nothing in these T&Cs shall prejudice any rights and/or remedies SDS' has or may have against the Contracting Party in relation to contracts, licences and/or user permissions commencing prior to the Effective Date.
- 10.6. **The Contracting Party acknowledges that:**
- 10.6.1. **all copies of and/or references to Microsoft documents (including the Product Terms) are considered by SDS to be correct as at 28 February 2017 but may be subject to change by Microsoft without notice;**
- 10.6.2. **SDS accepts no liability or responsibility for any loss suffered by the Contracting Party as a result of reliance by the Contracting Party upon the accuracy of the Microsoft documents and/or websites referenced and/or set out in these T&Cs. The Contracting Party further acknowledges that the responsibility to ensure the accuracy and completeness of all Microsoft documents and websites referenced herein and compliance with the same, including all Use Rights, Product Terms, relevant duties, conditions, responsibilities and/or liabilities vests at all times with the Contracting Party;**
- 10.6.3. **without prejudice to the Contracting Party's obligation under clause 2.4.2, when complying with the Use Rights, the Contracting Party shall comply with the obligations on the "Customer" and shall contact SDS as soon as reasonably practicable at [itpcontracts@sds.co.uk](mailto:itpcontracts@sds.co.uk) if the Contracting Party has not complied with, or believes it is unable to comply with, any obligation of the "Customer" under the Use Rights; and**
- 10.6.4. **the provisions in these T&Cs relating to the actions of Microsoft and/or the operation of the Use Rights and/or Product Terms are for information purposes only and are no substitute for the Contracting Party reading and seeking independent legal advice on these T&Cs.**
- 11. Defence of third party claims**
- 11.1. Subject always to (i) the terms of these T&Cs and (ii) the Contracting Party complying with the terms of these T&Cs, SDS agrees it will seek to enforce the rights it has against Microsoft under the Microsoft Agreements (if any) in order to defend the Contracting Party against any claims made by an unaffiliated third party in respect of intellectual property infringement arising from the proper use of the Software and/or Online Services by the Contracting Party in accordance with these T&Cs (a "Claim").
- 11.2. The Contracting Party acknowledges and agrees that any Claim made by an unaffiliated third party, and/or corresponding right of the Contracting Party, under clause 11.1 shall be subject to the following conditions and limitations:
- 11.2.1. clause 11.1 shall not apply to Claims based on (1) Customer Data, (2) non-Microsoft software, (3) modifications made to a Microsoft product (including the Software and/or Online Services) or service or any specifications or materials the Contracting Party and/or SDS provides; (4) combination of a Microsoft product or service with a non-Microsoft product, data or business process; (5) use of a Microsoft trademark without express, written consent, or the use or redistribution of a Microsoft product or service (including the Software and/or Online Services) in violation of these T&Cs (6) continued use of a Microsoft product or service (including the Software and/or Online Services) after being notified to stop due to a third party claim or (7) Microsoft products and/or services provided free of charge;
- 11.2.2. the Contracting Party must notify SDS promptly of any third party claim relevant to clauses 11.1 and 11.2, give SDS sole control over the defence or settlement and provide reasonable assistance in defending the claim; and
- 11.2.3. in no event will SDS or Microsoft be liable for indirect, incidental, special, punitive or consequential damages, including loss of use, loss of profits, or interruption of business, however causes or on any theory of liability.
- 11.3. The Contracting Party will defend SDS against any claims made by a person that (i) any Customer Data or non-Microsoft software hosted on behalf of the Contracting Party infringes that person's patent, copyright or trademark or makes unlawful use of its Trade Secret; or (ii) arises from use of an Online Service in violation of applicable laws and regulations; a violation of the legal rights of others; or unauthorised access or disruption of any service, data, account or network in connection with the use of the Online Services.
- 11.4. The Contracting Party will pay the amount of any adverse final judgment or approved settlement (which must be approved in writing by SDS) resulting from a claim covered by clause 11.3 and reimburse out of pocket expenses of SDS incurred in providing any assistance in defending the claim.
- 11.5. In the event that any claim under this clause 11 may result in a legal bar prohibiting the Contracting Party's use of a Microsoft product or services (including the Software or Online Services) SDS shall be entitled to terminate the Assignment and these T&Cs in which case the Contracting Party must immediately discontinue use of the Microsoft product or services.
- 12. Confidentiality**
- 12.1. "Confidential Information" is non-public information of SDS and/or Microsoft that is designated "confidential" or that a reasonable person should understand is confidential, including the terms of these T&Cs, the Use Rights, information relative to the Software, the Online Services and use thereof and all product or services pricing. Confidential Information does not include information that (1) becomes publicly available without a breach of these T&Cs, (2) the receiving party received lawfully from another source without a confidentiality obligation, (3) is independently developed, or (4) is a comment or suggestion volunteered about the disclosing party's business, products or services.
- 12.2. The Contracting Party will take reasonable steps to protect the Confidential Information. The Contracting Party will use Confidential Information only to the extent necessary for the fulfillment of the Contracting Party's obligations under the Agreement(s) through proper use of the User Permission in accordance with these T&Cs. The Contracting Party will not disclose Confidential Information to third parties, except to its employees and/or agents ("Representatives") and then only on a need-to-know basis under nondisclosure obligations at least as protective as these T&Cs. The Contracting Party remains responsible for the use of Confidential Information by its Representatives and, in the event of discovery of any unauthorised use or disclosure, must promptly notify SDS.
- 12.3. The Contracting Party may disclose Confidential Information if required by law, but only after it notifies SDS (if legally permissible).
- 12.4. These obligations apply to Confidential Information for a period of five years after the Confidential Information is received.
- 13. Freedom of Information**
- The Contracting Party acknowledges that SDS is subject to the requirements of the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (together "FOISA") (as amended and/or replaced from time to time) and shall assist and cooperate with SDS to enable SDS to comply with its information disclosure obligations, including without

**THE SKILLS DEVELOPMENT SCOTLAND CO. LIMITED  
TERMS & CONDITIONS FOR USER PERMISSIONS**

limitation, providing such information and/or documentation as SDS may require in order to meet its statutory obligations. SDS shall be responsible for determining in its absolute discretion notwithstanding any other provision to the contrary in or pursuant to these T&Cs or any other agreement, whether the information and/or any other information is exempt from disclosure in accordance with the provisions of FOISA, and may at its absolute discretion disclose to a third party any information relating to or provided by or on behalf of the Contracting Party. In no event shall the Contracting Party respond directly to a request for information pursuant to FOISA unless expressly authorised to do so by SDS.

**14. Waiver**

The failure to insist upon strict performance of any provision of these T&Cs, or the failure of a party to exercise, or any delay in exercising, any right or remedy shall not constitute a waiver of that right or remedy and shall not cause a diminution of the obligations established by these T&Cs. No waiver shall be effective unless it is expressly stated to be a waiver and communicated in writing and signed by the waiving party. A waiver of any right or remedy arising from a breach of the T&Cs shall not constitute a waiver of any right or remedy arising from any other or subsequent breach of the T&Cs nor constitute a waiver of any right or remedy arising from breach or subsequent breach of any other contract (including any licence) between the parties.

**15. Severance**

If any provision of these T&Cs (or any document to be entered into or complied with pursuant to or in connection with it) is or becomes illegal, invalid or unenforceable in any jurisdiction that does not affect (i) the legality, validity or enforceability in that jurisdiction of any other provision of these T&Cs; or (ii) the legality, validity or enforceability in any other jurisdiction of that or any other provision of these T&Cs. In the event that such illegality, invalidity or unenforceability is so fundamental as to prevent the accomplishment of the purpose of these T&Cs, SDS and the Contracting Party shall as soon as reasonably practicable commence good faith negotiations with a view to resolving the position.

**16. Further Assurance**

The Contracting Party shall, and shall procure that its employees, agents and sub-contractors and/or any necessary third party shall, promptly execute and deliver such documents and do all such things, as SDS and/or Microsoft may from time to time reasonably require for the purpose of giving full effect to the provisions of these T&Cs.

**17. Survival**

All provisions of these T&Cs survive termination or expiration of these T&Cs except those requiring performance only during the Term.

**18. Governing Law and Jurisdiction**

SDS and the Contracting Party accept the exclusive jurisdiction of the Scottish courts and agree that these T&Cs are to be governed by and construed according to Scots Law. Nothing in this clause shall limit SDS's right to take proceedings against the Contracting Party in any other court of competent jurisdiction.