

Terms and Conditions of Supply

1 Interpretation

1.1 In these terms and conditions ("Conditions"), the following definitions apply:

Business Day	means a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.
Conditions	means the terms and conditions set out in this document as amended from time to time in accordance with clause 12.6.
Contract	means the contract between Elektromotive and the Customer for the sale and purchase of the Goods which comprises the Order, Specification and these Conditions.
Customer	means the person or firm who orders the Goods from Elektromotive.
Elektromotive	means Elektromotive Limited a company incorporated and registered in England and Wales with company number 04676138 whose registered office is at The Sussex Innovation Centre Science Park Square Falmer Brighton East Sussex BN1 9SB.
Goods	means any goods and/or services (or any part of either of them) set out in the Order.
Intellectual Property Rights	all patents, rights to inventions, utility models, copyright and related rights, trade marks, service marks, trade, business and domain names, rights in trade dress or get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database right, topography 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
Order	means the Customer's order for the Goods, as set out in the Customer's written acceptance of Elektromotive's quotation.
Specification	means any specification for the Goods, including any related plans and drawings, that are agreed by the Customer and Elektromotive.
Software	means Elektromotive's proprietary server software "EBConnect" which is more particularly described at www.elektromotive.com/resources/EBConnect_Diagram.pdf
Warranty/ies	means the sole warranties that apply to the Goods as set out in full at [insert web link] and which are also contained in the packaging for each Good.

1.2 In these Conditions, a reference to:

- 1.2.1 A party includes its personal representatives, successors or permitted assigns;
- 1.2.2 A statute or statutory provision is a reference to such statute or provision as amended or re-enacted and includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted;
- 1.2.3 Any phrase introduced by the terms **including**, **include**, **in particular** or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms; and
- 1.2.4 The terms "**writing**" or "**written**" includes faxes and shall also include e-mails.

2 Basis of contract

- 2.1 These Conditions apply to every Order to the exclusion of any others that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing and all Orders for Goods shall be deemed to be an acceptance by the Customer to purchase Goods pursuant to these Conditions.
- 2.2 Each Order shall be deemed to be a separate offer by the Customer to purchase Goods on the terms of these Conditions, which Elektromotive shall be free to accept or decline at its absolute discretion and each Order shall only be deemed to be accepted when Elektromotive issues a written acceptance of the Order, at which point the Contract shall come into existence.
- 2.3 A quotation for the Goods given by Elektromotive shall not constitute an offer. A quotation shall only be valid for a period of 20 Business Days from its date of issue.
- 2.4 The Customer is responsible for ensuring that the terms of the Order and any applicable Specification are complete and accurate.
- 2.5 The Contract constitutes the entire agreement between the parties. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of Elektromotive which is not set out in the Contract.
- 2.6 Any samples, drawings, descriptive matter, or advertising produced by Elektromotive and any descriptions or illustrations contained in Elektromotive's catalogues or brochures are produced for the sole purpose of giving an approximate idea of the Goods described in them and shall not form part of the Contract or have any contractual force.
- 2.7 Elektromotive reserves the right to amend the Specification if required in order to comply with by any applicable statutory or regulatory requirements.

3 Delivery and Completion

- 3.1 Elektromotive shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (**Delivery Location**) at any time after Elektromotive notifies the Customer that the Goods are ready and for the purpose of this clause 3, "delivery" shall mean delivery of goods or completion of Services, as the context requires.
- 3.2 Delivery of the Goods shall be completed on their arrival at the Delivery Location or upon their completion (in the case of services).
- 3.3 Any dates quoted for delivery are approximate only, and the time of delivery is not of the essence. Elektromotive shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event (as defined in clause 11 below) or the Customer's failure to provide Elektromotive with adequate delivery instructions or any other instructions that are relevant to the supply or delivery of the Goods.
- 3.4 If Elektromotive fails to deliver the Goods, its liability shall be limited to the value of the Goods that were not delivered. Elektromotive shall have no liability for any failure to deliver the Goods if such failure is in any way attributable to a Force Majeure Event or the Customer's failure to provide Elektromotive with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 3.5 If the Customer fails to take or accept delivery of the Goods within 1 Business Day of Elektromotive notifying the Customer that the Goods are ready (or as otherwise agreed in writing by Elektromotive), then, except where such failure or delay is caused by a Force Majeure Event or Elektromotive's failure to comply with its obligations under the Contract:
- 3.5.1 delivery of the Goods shall be deemed to have been completed at 9.00 am on the third Business Day after the day on which Elektromotive notified the Customer that the Goods were ready; and
- 3.5.2 Elektromotive shall store the Goods until delivery takes place, and shall be entitled to charge the Customer for all related costs and expenses (including insurance).
- 3.6 The Customer shall not be entitled to reject the Goods if Elektromotive delivers up to and including 5% more or less than the quantity of Goods ordered, but a pro rata adjustment shall be made to the Order invoice on receipt of notice from the Customer that the wrong quantity of Goods was delivered.
- 3.7 Elektromotive may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate Contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

4 Quality

- 4.1 The Goods are supplied subject to the Warranties and except as set out in the Warranties, all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.
- 4.2 These Conditions shall apply to any repaired or replacement Goods supplied by Elektromotive however the period of Warranty shall not be extended in respect of any repaired or replacement Goods supplied by Elektromotive.

5 Title and risk

- 5.1 The risk in the Goods shall pass to the Customer on completion of delivery however title to the Goods shall not pass to the Customer until Elektromotive has received payment in full (in cash or cleared funds) for the Goods and any other goods or services that Elektromotive has supplied to the Customer in respect of which payment has become due.
- 5.2 Until title to the Goods has passed to the Customer, the Customer shall:
- 5.2.1 hold the Goods on a fiduciary basis as Elektromotive's bailee;
- 5.2.2 store the Goods separately from all other goods;
- 5.2.3 not remove, deface or obscure any identifying mark or packaging of the Goods;
- 5.2.4 maintain the Goods in good condition and insure them against all risks for their full price from the date of delivery;
- 5.2.5 notify Elektromotive immediately if it becomes subject to any event listed in clause 9.2
- but the Customer may resell or use the Goods in the ordinary course of its business.
- 5.3 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 9.2, or Elektromotive reasonably believes that any such event is about to happen and notifies the Customer accordingly, then, provided that the Goods have not been resold, or irrevocably incorporated into another product, and without limiting any other right or remedy Elektromotive may have, Elektromotive may at any time require the Customer to deliver up the Goods and, if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

6 Price and payment

- 6.1 The price of the Goods shall be the price set out in the Order, or, if no price is quoted, the price set out in Elektromotive's published price list in force as at the date of delivery.
- 6.2 Elektromotive may, by giving notice to the Customer at any time before delivery, increase the price of the Goods to reflect any increase in the cost of the Goods that is due to:
- 6.2.1 any factor beyond Elektromotive's control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);
- 6.2.2 any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Specification; or

6.2.3 any delay caused by any instructions of the Customer or failure of the Customer to give Elektromotive adequate or accurate information or instructions.

6.3 The price of the Goods is exclusive of the costs and charges of packaging, insurance and transport of the Goods and value added tax (**VAT**) which the Customer shall pay on receipt of a valid invoice from Elektromotive.

6.4 Elektromotive may invoice the Customer for the Goods on or after the completion of delivery or as soon as the Goods are ready to be delivered to, or collection by, the Customer.

6.5 The Customer shall pay the invoice in full and in cleared funds within 20 Business Days of the date of the invoice. Payment shall be made to the bank account nominated in writing by Elektromotive. Time of payment is of the essence.

6.6 If the Customer fails to make any payment due to Elektromotive under the Contract by the due date for payment (**due date**), then the Customer shall pay interest on the overdue amount at the rate of 4% per annum above Barclays Bank Plc's base rate from time to time. Such interest shall accrue on a daily basis from the due date until the date of actual payment of the overdue amount, whether before or after judgment.

6.7 The Customer shall pay all amounts due under the Contract in full without any deduction or withholding except as required by law and the Customer shall not be entitled to assert any credit, set-off or counterclaim against Elektromotive in order to justify withholding payment of any such amount in whole or in part. Elektromotive may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it by the Customer against any amount payable by Elektromotive to the Customer.

7 Software

7.1 Subject to the terms and conditions of this Agreement and the payment of the relevant licence fee as set out in a quotation or Order as set by Elektromotive, Elektromotive hereby grants to the Customer a non-exclusive, non-transferable right to access the Software for the purpose described at www.elektromotive.com/resources/EBConnect_Diagram.pdf.

7.2 The Customer shall not:

7.2.1 except as may be allowed by any applicable law which is incapable of exclusion by agreement between the parties:

- (i) attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software; or
- (ii) attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
- (iii) subject to clause 7.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, commercially exploit, or otherwise make the Software available to any third parties except as authorised by Elektromotive.

7.3 Subject to any of your rights as may exist under any legislation implementing the E.C. Council Directive on the Legal Protection of Computer Programs the Customer will not, directly or indirectly:

7.3.1 reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code, object code, or underlying structure, ideas, or algorithms of, or found at or through any Software, documentation, or data related thereto; and

7.3.2 modify, translate, or create derivative works based on the Software; or

7.3.3 or copy, distribute, pledge, assign, or otherwise transfer or encumber rights to the Software.

8 Intellectual Property Rights

8.1 All Intellectual Property Rights relating to the Goods shall remain vested in Elektromotive and the Customer acknowledges this and agrees to take all steps necessary to give effect to this clause.

8.2 The Customer covenants and undertakes with Elektromotive that it shall not at any time alter, obscure, remove or interfere with any of the Intellectual Property Rights or cause or permit anything which may damage or endanger the Intellectual Property Right, or fail to notify Elektromotive immediately if it becomes aware of any unauthorised use of the Intellectual Property Rights.

9 Customer's insolvency or incapacity

9.1 If the Customer becomes subject to any of the events listed in clause 9.2, or Elektromotive reasonably believes that the Customer is about to become subject to any of them and notifies the Customer accordingly, then, without limiting any other right or remedy available to Elektromotive, Elektromotive may cancel or suspend all further deliveries under the Contract or under any other contract between the Customer and Elektromotive without incurring any liability to the Customer, and all outstanding sums in respect of Goods delivered to the Customer shall become immediately due.

9.2 For the purposes of clause 9.1, the relevant events are:

9.2.1 the Customer suspends, or threatens to carry on all or substantially the whole of its business, or suspends payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts;

9.2.2 the Customer commences negotiations with creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors;

9.2.3 (being a company) actions take place which are intended wind up of the Customer, other than for the sole purpose of a scheme for a solvent amalgamation of the Customer with one or more other companies or the solvent reconstruction of the Customer;

9.2.4 (being an individual) the Customer is the subject of a bankruptcy petition or order;

- 9.2.5 a creditor or encumbrancer of the Customer 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 its assets and such attachment or process is not discharged within 14 days;
- 9.2.6 (being a company) an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the Customer;
- 9.2.7 a third party becomes entitled to appoint a receiver over the Customer's assets or a receiver is appointed over the Customer's assets;
- 9.2.8 any event occurs, or proceeding is taken, with respect to the Customer in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 9.2.1 to clause 9.2.7 (inclusive);
- 9.2.9 the Customer's financial position deteriorates to such an extent that in Elektromotive's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.
- 9.3 Termination of the Contract, however arising, shall not affect any of the parties' rights and remedies that have accrued as at termination. Clauses which expressly or by implication survive termination of the Contract shall continue in full force and effect.

10 Limitation of liability

- 10.1 Nothing in these Conditions shall limit or exclude Elektromotive's liability for:
- 10.1.1 death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);
- 10.1.2 fraud or fraudulent misrepresentation;
- 10.1.3 any matter in respect of which it would be unlawful for Elektromotive to exclude or restrict liability.
- 10.2 Subject to clause 10.1:
- 10.2.1 Elektromotive shall under no circumstances whatever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract; and
- 10.2.2 Elektromotive's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed 100% of the price of the Goods paid by the Customer.

11 Force majeure

Neither party shall be liable for any failure or delay in performing its obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. A **Force Majeure Event** means any event beyond a party's reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, including strikes, lock-outs or other industrial disputes (whether involving its own workforce or a third party's), failure of energy sources or transport network, acts of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions, or default of suppliers or subcontractors.

12 General

12.1 Assignment and subcontracting.

- 12.1.1 Elektromotive may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract.
- 12.1.2 The Customer may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract without the prior written consent of Elektromotive.

12.2 Notices.

- 12.2.1 Any notice or other communication given to a party under or in connection with the Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, sent by pre-paid first class post, recorded delivery, courier, fax or e-mail.
- 12.2.2 A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 12.2.1; if sent by pre-paid first class post or recorded delivery, at 9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by fax or e-mail, one Business Day after transmission.
- 12.2.3 The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

12.3 Severance.

- 12.3.1 If any court or competent authority finds that any provision of the Contract (or part of any provision) is invalid, illegal or unenforceable, that provision or part-provision shall, to the extent required, be deemed to be deleted, and the validity and enforceability of the other provisions of the Contract shall not be affected.

- 12.3.2 If any invalid, unenforceable or illegal provision of the Contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.
- 12.4 **Waiver.** A waiver of any right or remedy under the Contract is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.
- 12.5 **Third party rights.** A person who is not a party to the Contract shall not have any rights under or in connection with it.
- 12.6 **Variation.** Except as set out in these Conditions, any variation to the Contract shall only be binding when agreed in writing and signed by Elektromotive.
- 12.7 **Governing law and jurisdiction.** 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, English law, and the parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales.