



---

## DGAUGE LTD

---

### Conditions for the Provision of Technical Services

---

#### DGAUGE LTD

5 Mallard Way,  
Pride Park Derby  
DE24 8GX

#### CONDITIONS

These Conditions apply to the provision of technical services by DGauge Limited of 5 Mallard Way, Pride Park, Derby, DE24 8GX ("DGauge"), whose registered address is Friars Gate (Third Floor) 1011 Stratford Road, Shirley, Solihull, England, B90 4BN, to the Client. Excepting any provisions set out in the Proposal, these Conditions apply to the exclusion of any other terms and conditions including any which the Client may attempt to introduce by way of purchase order or otherwise.

**IMPORTANT: Notwithstanding any other provision of the Agreement DGauge will not be obliged to commence the provision of Services in accordance with the Agreement until it receives a valid purchase order from the Client in respect of the same.**

#### 1. Definitions

In these Conditions, the following expressions will have the following meanings, unless inconsistent with the context:

<b>“Additional Services”</b>	additional services to be provided by DGauge to the Client pursuant to clause 6.3 (if any)
<b>“Agreement”</b>	the agreement between DGauge and the Client formed by these Conditions and the Proposal
<b>“Business Day”</b>	any day which is not a Saturday, Sunday or public or bank holiday in England
<b>“Change in law”</b>	any change in law which impacts on the performance of the Services and which comes into force after the commencement of the Services
<b>“Change”</b>	a potential change to the Services proposed by the Client
<b>“Change Proposal”</b>	a proposal prepared by DGauge specifying in reasonable detail the amended or additional Services, the charges or charging principles for the Change, its estimate of the effect which the Change will have on existing Services, resource requirements, likely implementation date(s) and, if applicable, how it considers its ability to carry out the Services as then being performed will be adversely affected by the Change
<b>“Charges”</b>	the charges for the Services as set out in the Proposal, as amended from time to time in accordance with clause 6.8
<b>“Client”</b>	shall mean the person, body or company who has agreed to accept the Services in accordance with the Agreement
<b>“Client Materials”</b>	the data, text, images, graphics, videos, logos and other content and material to be provided by the Client for use by DGauge in relation to the provision of the Services including that identified in the Proposal
<b>“Conditions”</b>	these terms and conditions which should be read in conjunction with the Proposal
<b>“Deliverables”</b>	the report and other documentation which DGauge is providing to the Client as part of the Services
<b>“Intellectual Property Rights”</b>	any and all patents, trade marks, service marks, copyright, moral rights, rights in design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating to the same
<b>“Proposal”</b>	the proposal document to which these Conditions are attached which sets out the scope of the Services and the Charges
<b>“Services”</b>	the technical and/or other services (if any) to be provided to the Client by DGauge pursuant to the Agreement, as set out in the Proposal

## 2. Interpretation

- 2.1 The headings used in the Agreement are inserted for convenience only and are not intended to be part of nor to affect the meaning or interpretation of any of the Agreement.

- 2.2 In the Agreement each reference to a gender includes all other genders, and the singular includes the plural and vice versa as the context shall admit or require.
- 2.3 The expression “person” means any individual, firm, body corporate, unincorporated association, partnership, government, state or agency of a state or joint venture.
- 2.4 In the event of a conflict between any of these Conditions and the Proposal, the conflict will be resolved according to the following order of priority: these Conditions then the Proposal.
- 2.5 The words “include”, “includes”, “including” and “included” will be construed without limitation unless inconsistent with the context.
- 2.6 Subject to clause 12.3 the Agreement (as varied in accordance with its terms) forms the entire understanding of the parties in respect of the matters dealt within it and supersedes all previous agreements, understandings and negotiations between them.
- 2.7 The parties do not intend that any of the terms of the Agreement will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not party to it.

### 3. Provision of Services

- 3.1 DGauge warrants that it shall use reasonable skill, care and diligence in the performance of the Services to the Client upon the terms and conditions set out in the Proposal and these Conditions.
- 3.2 DGauge will provide the Services for the term specified in the Proposal, subject to any extension or earlier termination in accordance with these Conditions.
- 3.3 DGauge will only be obliged to provide the Services at its premises or any other location stated in the Proposal.
- 3.4 DGauge will use its reasonable endeavours to provide the Services in accordance with any timescales set out in the Proposal, but will not be liable to the Client for any failure to do so.
- 3.5 Without prejudice to clause 8, DGauge will not be liable for any failure to provide the Services which arises as a result of the failure by the Client or any third party working for, with or under the instruction of the Client to comply with its obligations as set out in the Agreement.
- 3.6 DGauge will not be obliged to provide any services which are not Services referred to in the Proposal, unless otherwise agreed with the Client in writing pursuant to clause 6.3.
- 3.7 Both parties shall comply with their respective obligations in respect of the provision of the Services. If there is a Change in law which results in amendments being required to the Services, the parties agree any such Change in law shall be deemed to be a change and DGauge shall be subject to the Change Proposal Process set out in clause 6.3.

### 4. Client Responsibilities

- 4.1 The Client will (where required to under the Proposal) supply to DGauge, at no cost, the Client Materials in accordance with any timescales set out in the Proposal, or if no timescales are set out in the Proposal within a reasonable time taking account of the obligations of DGauge.
- 4.2 The Client warrants that the Client Materials will be accurate in all material respects and will not knowingly include any material which is illegal or the accessing, holding, transmitting or supplying of which would be a criminal offence or otherwise unlawful or in breach of any laws or codes of practice or rights of third parties which may apply to the Client Materials. Without limitation to the above, the Client warrants that all necessary licences, consents and waivers

(including those from all rights owners, performers and other contributors) will be obtained and paid for by the Client. Without prejudice to the above, DGauge may decline to use any Client Materials on any reasonable grounds and will have no resulting liability to the Client under or in connection with the Agreement if it does so.

- 4.3 The Client will comply with any obligations placed upon it in the Proposal in good time.
- 4.4 The Client will supply in a timely manner all information, instructions, review and feedback reasonably required by DGauge for the performance of its obligations under the Agreement and will appoint a representative who is fully empowered and authorised to provide the same.
- 4.5 If the Client or any third party working for, with or under the instruction of the Client, provides incomplete or inaccurate information, or delays unduly in the performance of any of its obligations DGauge reserves the right to stop work and agree suitable changes to prices and delivery terms or terminate this Agreement and the Client shall indemnify DGauge in respect of all liability arising from such termination.
- 4.6 The Client shall (where applicable) provide DGauge, its employees, agents and consultants with access to the Client's personnel, contractors, agents, premises, office accommodation and other facilities as reasonably required by DGauge.
- 4.7 The Client shall obtain and maintain all necessary licenses, permissions and consents including procuring the provision of a suitably qualified person (including holding a Network Rail approved Safety Case) to supervise and be responsible for the safety of any DGauge personnel who are required to work on or around tracks forming part of an operational railway, whether owned by Network Rail or by other third parties.
- 4.8 The Client shall ensure that suitably qualified and experienced staff are available on reasonable notice to provide all reasonable assistance to DGauge to facilitate the provision of the Services.

## 5. Personnel

- 5.1 DGauge will use its reasonable endeavours to use the designated personnel referred to in the Proposal in connection with the provision of the Services, but will not be liable for any failure to provide such personnel which arises for reasons outside its reasonable control.
- 5.2 DGauge shall ensure that the personnel who provide the Services to the Client are suitably qualified and competent to provide the Services.
- 5.3 If as a result of accident, illness, termination of employment or otherwise the designated personnel becomes unavailable, DGauge undertakes to provide a suitable replacement and the duration of this Agreement shall be extended by a reasonable period of time to accommodate such replacement.
- 5.4 Holidays may be taken by DGauge staff without the Client's consent, but DGauge shall consult with the Client and shall use all reasonable endeavours to reduce disruption to the Services caused by any holiday time.

## 6. Charges

- 6.1 The Client will pay to DGauge the Charges at the rates or in the amounts set out in the Proposal.
- 6.2 The Charges and other amounts payable by the Client pursuant to this clause 6 are (unless stated otherwise in the Proposal) exclusive of the reasonable expenses of DGauge incurred in connection with the provision of the Services including the cost of:

- 6.2.1. travel;

- 6.2.2. accommodation;
- 6.2.3. subsistence;
- 6.2.4. materials; and
- 6.2.5. third party services;

which will be payable by the Client in addition to the Charges.

6.3 Where:

- 6.3.1. DGauge agrees in writing pursuant to any Change Proposal to provide services to the Client in addition to the Services;
- 6.3.2. the Client changes its requirements and DGauge agrees to accept that change and to undertake the work resulting from it; or
- 6.3.3. DGauge incurs additional obligations or time as a consequence of the Client's failure to comply with its obligations under the Agreement;

the Client will pay for those Additional Services at the rates of DGauge applicable to the provision of the Additional Services set out in the Proposal.

- 6.4 DGauge may invoice the Client for the Charges and other amounts payable by the Client pursuant to this clause 6 in accordance with any payment profile set out in the Proposal or, if not set out in the Proposal, at the end of each calendar month in respect of the Services and Additional Services provided in that month.
- 6.5 Any sums payable by the Client to DGauge under the Agreement are exclusive of value added tax or any similar taxes, levies or duties, which will be added to such sums and be payable by the Client at the appropriate rate.
- 6.6 The Client agrees to pay DGauge's invoices within 30 days of the date of the invoice. Without prejudice to clause 6.7 if invoices are not settled in full by then, the Client will be liable to pay interest on any sum outstanding from the due date for payment at the annual rate of 2% above the base lending rate from time to time of Barclays Bank plc accruing on a daily basis until payment is made whether before or after any judgment. Such interest shall be due for payment immediately on invoice by DGauge.
- 6.7 If the Client does not pay the Charges or any other amounts become payable in accordance with this clause 6, DGauge may (without prejudice to its other rights and remedies) withhold further provision of the Services and of Deliverables until payment is made.
- 6.8 DGauge may increase any rates set out in the Proposal (and any Charges based on such rates) on the review date set out in the Proposal and annually thereafter by up to 5% of the then applicable rate. Such increase to come into effect on the immediately following 1st January.

## 7. Warranties and claims

- 7.1 Where the Services include the supply of goods or materials, DGauge shall vest the benefit of any warranty provided by the suppliers of such goods or materials in the Client. DGauge shall not provide any further warranty for goods or materials.
- 7.2 DGauge will not be liable for a breach of the warranty in clause 3.1 unless the Client notifies DGauge in writing of such failure within 30 days of the performance of the relevant Services.

- 7.3 If the Client makes a valid claim against DGauge based on a failure by DGauge to comply with a warranty in clause 3.1 or 7.1 DGauge may, at its option, take such steps as it deems necessary to remedy such failure or refund such part of the amount payable by the Client under clause 6 as relates to the relevant Services or goods (as the case may be). In the event that DGauge takes such steps or makes such refund it will have no further liability for a breach of the warranty in clause 3.1 or 7.1 in respect of the provision of the Services and/or any Additional Services or goods.

## 8. Non-solicitation

- 8.1 The Client shall not, during the term of this Agreement or for a period of 12 months after termination howsoever caused, directly or indirectly solicit or entice away or endeavour to solicit or entice away from DGauge or employ or offer to employ any employee of DGauge who has been engaged in the provision of the Services. In the event that the Client is in breach of this clause then the Client shall pay DGauge by way of liquidated damages an amount equal to 30% (Thirty Percent) of the gross annual salary of the relevant employee, as at the time of the breach by the Client.

## 9. Third Party Software

- 9.1 To the extent that the Services (or any part thereof) require the use of any third party software (including but not limited to Vampire ® Pro) ("**Software Services**") the following conditions shall apply:
- 9.1.1 DGauge shall have no liability to the Client for any results of the use of such third party software in the event of any fault or error in such software (including but not limited to any failure by the vendor of such software to adequately update it).
- 9.1.2 In the event that DGauge no longer holds a licence to use such software it shall be relieved of its obligation to perform the Software Services provided always that it shall refund the Client for any pre-paid fees which relate to Software Services that have not been performed.
- 9.1.3 DGauge shall be entitled to change the scope of the Software Services or the method of their delivery in order to comply with its licence for the relevant third party software.

## 10. Confidential Information

- 10.1 Each party will (unless contrary to law):
- 10.1.1. keep confidential all information obtained from the other under or in connection with the Agreement ("**Information**");
- 10.1.2. not disclose any Information to any third party without the prior written consent of the other except to such persons and to such extent as may be strictly necessary for the performance of the Agreement; and
- 10.1.3. not use any Information otherwise than for the purposes of the Agreement.
- 10.2 Each party will take all necessary precautions to ensure that all Information:
- 10.2.1. is given to each member of staff only to the extent necessary for that member of staff's activities in connection with the Agreement; and
- 10.2.2. is treated as confidential and not disclosed (without prior approval) or used by any staff otherwise than for the purposes of the Agreement.
- 10.3 The provisions of clauses 10.1 and 10.2 do not apply to any Information:

- 10.3.1. which is or becomes public knowledge (otherwise than by breach of this clause); or
- 10.3.2. which was in the possession of the party concerned without restriction as to its disclosure before receiving it from the disclosing party; or
- 10.3.3. which is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

and nothing in this clause 10 prevents either party from disclosing any Information for a proper purpose to a public authority or any regulatory body, or to a court of law in the United Kingdom or elsewhere in legal proceedings, or to its senior management, its auditors, bankers, lawyers or other professional advisers.

- 10.4 Nothing in this clause 10 prevents either party from using any techniques, ideas or know how gained during the performance of the Agreement in the course of its normal business to the extent that this does not result in a disclosure of confidential information.
- 10.5 The provisions of this clause 10 will continue to apply notwithstanding termination of the Agreement.
- 10.6 DGauge will be able to refer to the fact that it has undertaken work for the Client in any of its marketing materials provided that in doing so it does not disclose the Client's software Information.

## 11. Intellectual Property

- 11.1 Save any element owned by a third party or that cannot be transferred as a matter of law, title in the Deliverables shall pass to the Client upon payment of the Charges in full and in cleared funds.
- 11.2 Subject to clause 11.1 above the Client acknowledges and agrees that it will not own or acquire ownership of any of the Intellectual Property Rights in any knowhow, product (including but not limited to any software) or materials provided or used in connection with the Agreement or which may arise in connection with DGauge's performance of this Agreement and that it will have no rights in or to any such knowhow, product or materials other than the rights expressly granted by the Agreement. The Client may however make use of such Intellectual Property Rights to the extent required to make use of any product or materials delivered to the Client by DGauge under the Agreement for the purposes for which such product or materials was/were created, as envisaged by the Proposal.
- 11.3 The Client will indemnify and keep DGauge indemnified from and against all costs (including the costs of enforcement), expenses, liabilities (including any tax liability), injuries, losses, damages, claims, demands, legal costs (on a full indemnity basis) and judgments which DGauge incurs or suffers as a consequence of infringement of any Intellectual Property Right of any third party arising directly or indirectly from:
  - 11.3.1. the Client's failure to procure all necessary rights from third parties (including intellectual property licences) which are from time to time required in order for DGauge to be able legally to provide the Services; or
  - 11.3.2. the use by DGauge in connection with the Agreement of the Client Materials.

## 12. Liability

- 12.1 The provisions of this clause 12 and clause 7 set out the entire liability of DGauge (including any liability for the acts or omissions of its consultants, employees, agents and authorised representatives) to the Client in respect of:
- 12.1.1. any breach of the Agreement; and
  - 12.1.2. any representation, statement or tortious act or omission including negligence arising under or in connection with the Agreement.
- 12.2 All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by section 12 of the Sale of Goods Act 1979) are excluded from the Agreement to the fullest extent permitted by law.
- 12.3 Nothing in the Agreement excludes or limits the liability of DGauge for death or personal injury caused by the negligence of DGauge, for fraud or for any liability which cannot be excluded or limited as a matter of law.
- 12.4 DGauge shall have no liability to the Client for any defect in the Services to the extent that such defect arises (in whole or in part) from inaccurate or incomplete information provided by the Client or any third party
- 12.5 Limitation of Liability for Subcontractor Data
- 12.5.1 Where the Client requires DGauge to subcontract any part of the Services to a Nominated Subcontractor, DGauge shall not be held liable for any inaccuracies, errors, or omissions in data, information, or materials provided by Nominated Subcontractors. The Client acknowledges and agrees that DGauge relies on the accuracy and completeness of such subcontractor-provided data and that any reliance by the Client on Deliverables incorporating this data is at the Client's own risk.
- 12.5.2 In the event that a Nominated Subcontractor incurs additional costs beyond those outlined in the initial Proposal, DGauge reserves the right to pass these costs on to the Client. Such costs will only be transferred to the Client upon prior written agreement detailing the nature and amount of the additional expenses.
- For the purposes of this clause 12.5, "Nominated Subcontractor" shall mean any party subcontracted to DGauge: (i) after having been nominated or selected by the Client; and / or (ii) as a result of the Client's requirement for DGauge to subcontract elements of its scope that are outside DGauge's usual field of competency. Nominated Subcontractors include, without limitation, surveyors.
- 12.6 Subject to clauses 12.2 and 12.3:
- 12.6.1. the total liability of DGauge in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with the performance or contemplated performance of the Agreement is limited:
    - 12.6.1.1. in the case of loss of or damage to the Client's tangible property, to £100,000; and
    - 12.6.1.2. in all other cases, to the aggregate amount of the sums paid by the Client to DGauge pursuant to the Agreement (excluding VAT and expenses) over the preceding 12 month period; and
  - 12.5.2. DGauge will not be liable to the Client in contract, tort, misrepresentation or otherwise (including negligence), for any;



12.5.2.1 indirect or consequential loss or damage, costs, expenses or other claims for consequential compensation whatsoever; or

12.5.2.2 loss of profit; or

12.5.2.3 loss of sales or business; or

12.5.2.4 depletion of goodwill or otherwise (whether direct or indirect); or

12.5.2.5 loss of anticipated savings; or

12.5.2.6 loss of agreement or contract; or

12.5.2.7 loss of opportunity. whether or not caused by the negligence of DGauge or its employees, agents or authorised representatives, which arises out of or in connection with the Agreement.

### 13. Force Majeure

Neither party is under any liability to the other party in respect of anything which, apart from this provision, may constitute a breach of the Agreement arising by reason of force majeure which means, in relation to either party, circumstances beyond the reasonable control of that party including acts of God, acts of any governmental or supra-national authority, war or national emergency, acts of terrorism, riots, civil commotion, fire, explosion, flood, epidemic, lock-outs (whether or not by that party), strikes and other industrial disputes (in each case, whether or not relating to that party's workforce), restraints or delays affecting shipping or carriers, inability or delay in obtaining supplies of adequate or suitable materials and currency restrictions.

### 14. Term and Termination

The Services will be performed and the Agreement will continue for the period referred to in the Proposal. Without prejudice to any rights of termination set out elsewhere in the Agreement:

14.1 DGauge may immediately terminate the Agreement (or at its option, any part of it) by notice in writing to the Client if the Client fails to pay to DGauge any sum due under the Agreement on the due date for payment;

14.2 either party may terminate the Agreement (or, at its option, any part of it) forthwith by notice in writing to the other if the other:

14.2.1. is in material breach of the Agreement and fails (where the breach is capable of remedy) to remedy the breach within 30 days of the receipt of a request in writing to remedy the breach, such request setting out the breach and indicating that failure to remedy the breach may result in termination of the Agreement;

14.2.2. becomes the subject of a voluntary arrangement under section 1 of the Insolvency Act 1986;

14.2.3. is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

14.2.4. has a receiver, manager, administrator or administrative receiver appointed over all or any parts of its undertaking, assets or income, has passed a resolution for its winding-up, or has a petition presented to any court for its winding-up or for an administration order; or

14.2.5. has ceased or threatened to cease to trade.

## 15. Consequences of Termination

- 15.1 Termination of the Agreement is without prejudice to the rights and duties of either party accrued prior to termination.
- 15.2 The clauses of the Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.
- 15.3 Upon termination of the Agreement, the Client will immediately pay all outstanding invoices raised by DGauge pursuant to the Agreement and pay for all work in progress not previously paid for on a reasonable pro-rata basis (subject to receipt of an invoice for the same from DGauge).

## 16. Dispute Resolution

- 16.1 Any dispute or difference (a “**Dispute**”) between DGauge and the Client in respect of or arising out of the Agreement will be dealt with in accordance with this clause 16.
- 16.2 In the first instance, a representative of each party will each use their reasonable endeavours to resolve the Dispute. If the Dispute cannot be resolved by such representatives, it will be referred to a senior representative of each party, who shall each use their reasonable endeavours to resolve the Dispute.

## 17. Severability

The illegality, invalidity or unenforceability of any provision of the Agreement will not affect the legality, validity or enforceability of the remainder. If any such provision is found by any court or competent authority to be illegal, invalid or unenforceable, the parties agree that they will substitute provisions in a form as similar to the offending provisions as is possible without thereby rendering them illegal, invalid or unenforceable.

## 18. Waiver

- 18.1 The failure or delay by either party in exercising any right, power or remedy of that party under the Agreement will not in any circumstances impair such right, power or remedy nor operate as a waiver of it. The single or partial exercise by either party of any right, power or remedy under the Agreement will not in any circumstances preclude any other or further exercise of it or the exercise of any other right, power or remedy.
- 18.2 Any waiver by either party of a breach of or default under any of the terms of the Agreement by the other party is not deemed a waiver of any subsequent breach or default and in no way affects the other terms of the Agreement.

## 19. Assignment and Subcontracting

- 19.1 The Client may not assign the benefit or delegate the burden of the Agreement nor sub-license any of its rights under the Agreement (including to any company within the same group of companies as the Client) without the prior written consent of DGauge. Such consent shall not be unreasonably withheld.
- 19.2 DGauge may sub-contract or assign any or all of its rights and obligations under the Agreement.

## 20. Amendments

No variation or amendment to the Agreement is effective unless agreed in writing (including, without limitation, by clear exchange of emails).

## **21. Notices**

Any notice to be given or made by either party under or in connection with the Agreement must be in writing and given or made to the other party at its address stated in the Proposal or to such other address as either party may from time to time notify to the other. Every notice, if so addressed, is deemed to have been duly given or made, if delivered by hand, upon delivery at the address of the relevant party, if sent by prepaid first class post, two Business Days after the date of posting and if transmitted by facsimile, at the time of transmission (provided a confirmatory letter is sent by prepaid first class post) provided that, where, in accordance with the above provisions, any notice would otherwise be deemed to be given or made on a day which is not a Business Day or after 4.00 p.m. on a Business Day, such notice shall be deemed to be given or made at 9.00 a.m. on the next Business Day.

## **22. Applicable Law and Jurisdiction**

The construction, performance and validity of the Agreement will be governed by English law and the English courts have exclusive jurisdiction to settle any disputes which may arise out of or in connection with it.