

Terms and Conditions of Appointment

NHBC Services Limited – Acoustic and Air Leakage Services

1. Definitions

- 1.1. In these terms and conditions the following terms shall have the following meanings:-
 - 1.1.1. "Acoustic Services": means generally the acoustic services described in the Quotation issued by NHBC to the Client.
 - 1.1.2. "Air Leakage Services": means generally the acoustic services described in the Quotation issued by NHBC to the Client.
 - 1.1.3. "Building Regulations": regulations pertaining to the construction of buildings, made under the Building Act 1984, the Building (Scotland) Act 2003, and any similar legislation in force from time to time.
 - 1.1.4. "Client": the person, firm or company to whom NHBC is to provide Services under a Services Contract, as identified in the Quotation issued by NHBC to the Client.
 - 1.1.5. "Quotation": A letter or other form of written communication issued by NHBC to the Client in writing or an electronic format which confirms to the Client that NHBC has agreed to offer Services to the Client and which will include a description of the particular Services to be provided and the basis upon which the fees for those Services will be calculated.
 - 1.1.6. "Force Majeure Event": an event falling within the definition set out at Clause 14.1.
 - 1.1.7. "Intellectual Property Rights": all patents, copyrights and design rights (whether registered or not and all applications for any of the foregoing), and all rights of information, data, know-how or experience whether patentable or not whensoever's and howsoever arising and all renewals and extensions thereof.
 - 1.1.8. "NHBC": NHBC Services Limited, whose registered office is at NHBC House, Davy Avenue, Milton Keynes MK5 8FP and whose company registration number is 03067703.
 - 1.1.9. "Party": NHBC or the Client as the case may be.
 - 1.1.10. "Services": means Acoustic Services and/or Air Leakage Services, as applicable.
 - 1.1.11. "Services Contract": a contract between NHBC and the Client formed in accordance with clause 2.
 - 1.1.12. "Terms and Conditions": these standard terms and conditions of business.
- 1.2. Words importing the singular also include the plural and vice versa where the context requires.
- 1.3. Words importing persons or parties shall include firms, corporations and any other organisation having legal capacity.
- 1.4. The headings in the Terms and Conditions are not part of the Terms and Conditions nor shall they be taken into consideration in its interpretation or construction.

2. Services Contract formation

- 2.1. Where the Client expresses an interest in receiving Acoustic Services and/or Air Leakage Services, NHBC may provide a Quotation to the Client, detailing the Acoustic Services and/or Air Leakage Services that NHBC offers to provide to the Client. Subject to clause 2.2 below:
 - 2.1.1. The offer to provide Acoustic Services and/or Air Leakage Services shall be open for acceptance for the period defined in the Quotation as from the date of the Quotation, but may be withdrawn before the expiry of that period by NHBC in writing.
 - 2.1.2. If the Client confirms in writing that they accept the offer contained in a Quotation that will bring into force a contract ('Services Contract') between the Client and NHBC for the provision of the requested Services on the terms and conditions set out in this document for the fees referred to in the Quotation.
- 2.2. NHBC reserves the right to decline to provide Services if following the issue of a Quotation and subsequent receipt of further information, in NHBC's opinion it is unable to provide the Services. The client will be advised accordingly within 10 days of receipt of the pertinent information. If the Client has accepted the Quotation, the Services Contract shall terminate and neither party shall have any liability to the other arising from the termination.

3. Provision of Services

- 3.1. In carrying out the Services, NHBC shall exercise the reasonable care and skill to be expected of a competent provider of services similar in scope, nature and complexity to the Services. No other warranty or representation, express or implied, shall apply under and/or in connection with the Services Contract.



- 3.2. When any aspect of any Services is governed by any statutory provisions which apply specifically to those Services the Client acknowledges and agrees that NHBC shall act in accordance with the requirements of the statutory provisions (as they apply to NHBC as the service provider) and the Client agrees that they shall act in accordance with the requirements of the statutory provisions (as they apply to the client as the service recipient).

4. Fees and Expenses

- 4.1. All fees for performance of the Services shall be calculated in accordance with the fee structure set out in Quotation. NHBC shall be entitled to be paid the full amount of its fee even if provision of the Services cannot be started or completed, unless that is due to NHBC's breach of the terms of the Services Contract.
- 4.2. The Client shall reimburse to NHBC all expenses properly incurred by it in the performance of the Services, including without limitation, travel expenses, accommodation, subsistence, telephone, fax, postage, copying, photography, advertising and any other goods and Services purchased.
- 4.3. NHBC has the right to require payments to be made on account before commencing or completing any Services. In such event, the amount of the on account payment shall be calculated having regard to the programme for performance of the Services and the likely timing and amounts of expenses to be incurred.
- 4.4. Fees stated shall be exclusive of value added tax which, where applicable, shall be charged to the Client at the prevailing rate.
- 4.5. NHBC reserves the right to increase its daily charge rates applicable to a Services Contract annually on each anniversary of the date a Services Contract comes into force provided that any increase shall not be more than the percentage increase of the UK House Re-building Cost Index (HRCI) over the year; and NHBC shall give written notice of any increase.

5. Payment

- 5.1. Where the Services are to be provided for a fixed fee, invoices for a rateable proportion may be issued periodically when provision of a stage of the Services has been completed. Where the Services are to be provided on the basis of a daily charge rate, invoices for Services provided will be issued monthly in arrears.
- 5.2. All payments due to NHBC shall be made in sterling and without set-off or counterclaim and free of and without deduction for any taxes, levies or duties of any description.
- 5.3. NHBC may charge the Client interest (both before and after any judgment) on the balance of any unpaid invoice, at the rate of 5 % per annum over the Bank of England base rate. Such interest shall run from the due date of settlement of the invoice until the date payment of the balance is received.

6. The Client's Obligations

- 6.1. The Client shall pay to NHBC all fees, expenses and value added tax, as required pursuant to Clauses 3 and 4. NHBC may suspend and/or cease further work on behalf of the Client in the event of non, partial or late payment of any NHBC invoice.
- 6.2. The Client shall provide to NHBC all information, access to personnel with appropriate authority and (with the Client taking all appropriate safety precautions to ensure the safety of NHBC's personnel) access to premises reasonably required, and at the necessary times, and with the premises for which the Services are to be provided prepared to the appropriate condition, to enable NHBC to carry out the Services.
- 6.3. The Client acknowledges that NHBC is entitled to rely upon the accuracy, sufficiency and consistency of any information supplied to it by the Client. NHBC shall have no liability for any inaccuracies contained in any information provided by the Client or any third party on behalf of the Client.
- 6.4. The Client authorises NHBC to speak to or meet with any other person it may need to contact in order to provide the Services. NHBC may release to such person for the purpose of the Services any information reasonably necessary to perform the Services and which it has obtained in connection with the Services Contract. NHBC shall not be liable for any use subsequently made of that information.

7. Intellectual Property

- 7.1. NHBC is the beneficial owner of all Intellectual Property Rights arising out of or in connection with the provision of the Services to the Client.
- 7.2. Subject to all payments due in connection with a Services Contract having been paid, the Client shall have an irrevocable, royalty free, non-exclusive licence to copy and use all materials created by or on behalf of NHBC (and in relation to which NHBC is the beneficial owner of the Intellectual Property Rights) for any purpose relating to the Services Contract.

8. Documents and reliance on Services

- 8.1. The provision of the Services is for the Client's benefit only. The Client may share the results of the Services with third parties only for the purpose of demonstrating (within the scope of the Services and only in respect of the premises that are the subject of the Services) compliance with Building Regulations.
- 8.2. NHBC shall be entitled to keep any Client papers and documents held while payments due in respect of a Services Contract are outstanding. NHBC shall keep records of the Services for 6 years after issue of NHBC's final invoice, on the basis that NHBC shall have the Client's authority to destroy the files upon the expiry of that period unless the Client has beforehand requested in writing the return of Client papers or documents.

9. Confidentiality

- 9.1. The Client shall keep confidential and not disclose to any other person (whether before or after termination or expiry of the Services Contract): (a) any information received by it in respect of the methodologies and/or technologies used by NHBC in providing the Services; (b) the details of the commercial terms on which NHBC provides the Services; and (c) any other information in respect of NHBC's business activities which comes into its possession as a consequence of NHBC providing the Services and which is not publicly available.

- 9.2. NHBC shall keep confidential and not disclose to any other person (whether before or after termination or expiry of the Services Contract) any information in respect of the Client's business activities which comes into its possession as a consequence of NHBC providing the Services and which is not publicly available.
- 9.3. The provisions of Clauses 9.1 and 9.2 shall not apply to either Party to the extent that disclosure is required by law or regulatory authorities or to the respective professional advisers of the Parties.
- 9.4. NHBC may, unless the Client instructs otherwise, share information obtained through the provision of the Services within NHBC for the purpose of demonstrating compliance with Building Regulations.

10. Professional Indemnity Insurance

- 10.1. NHBC shall effect and maintain, for a period of 6 years from completion of any Services Contract, professional indemnity insurance with a limit of indemnity of no less than £5 million provided always that such insurance remains available at commercially reasonable rates.

11. Limitation of Liability

- 11.1. NHBC shall not be liable for any special, indirect or consequential loss or damage (including, without limitation, loss of profits or business revenue) suffered by the Client (including as a result of an action brought by a third party).
- 11.2. Without prejudice to the other sub-clauses of Clause 11 where a Services Contract involves NHBC being appointed as part of a Client project team, liability for loss and/or damage arising under or in connection with a Services Contract shall be limited to that proportion of the Client's loss and/or damage which it would be just and equitable to require NHBC to pay having regard to the extent of NHBC's responsibility for the same and on the basis that all other Client consultants and Services Contractors shall be deemed to have provided Services Contractual undertakings on terms no less onerous than this Clause 11.2 to the Client in respect of the performance of their Services in connection with the project and that there are no exclusions of or limitation of liability nor joint insurance or co-insurance provisions between the Client and any other party referred to above and on the basis they shall be deemed to have paid to the Client such proportion which would be just and equitable for them to pay having regard to the extent of their responsibility.
- 11.3. NHBC shall have no duty or liability in tort or delict to the Client save that nothing in this Clause 11 or elsewhere in the Services Contract, shall exclude or restrict any liability either Party may have for death or personal injury arising out of negligence.
- 11.4. The Client acknowledges and agrees that the materials used to prepare premises for testing may cause some cosmetic damage to the premises being tested. NHBC will use reasonable endeavours to avoid such damage and where such damage is unavoidable to keep to the minimum. However, the Client agrees that they (and not NHBC) shall be responsible for attending at their own expense to the repair of any such damage.
- 11.5. Notwithstanding anything to the contrary contained elsewhere in the Services Contract, the total liability of NHBC arising under or in connection with a Services Contract shall not exceed the lesser of i) £1,000,000 or four (4) times the aggregate amount of the fees paid and payable under the Services Contract.

12. Force Majeure

- 12.1. Neither Party shall be in default or liable to the other Party for any matter whatsoever for any delays in performance or from failure to perform or to comply with the Terms and Conditions due to any cause beyond that Party's reasonable control including, without limitation, acts of God, acts of Government or other competent regulatory authority, telecommunications, network operators, war or national emergency, riots, civil commotion, fire, explosion, flood, epidemic, lock-outs, strikes and other industrial disputes (in each case, whether or not relating to that Party's workforce).
- 12.2. Each Party agrees to give notice forthwith to the other upon becoming aware of a Force Majeure Event, such notice to contain details of the circumstances giving rise to the Force Majeure Event.

13. Termination

- 13.1. Without prejudice to any other rights or remedies a Party may possess:
 - 13.1.1. NHBC may terminate a Services Contract by notice immediately if the Client has failed to pay an invoice within 30 days of the final date for payment of that invoice.
 - 13.1.2. Either Party may terminate a Services Contract by notice immediately if the other Party becomes insolvent.
 - 13.1.3. Either Party may terminate a Services Contract by notice immediately if the other Party is in breach of its obligations and where such breach is capable of remedy the other Party fails to remedy such breach within 30 days of receipt of a notice specifying the breach.
- 13.2. For the purposes of Clause 13.1.2 a Party is insolvent if it enters into an arrangement, compromise or composition in satisfaction of its debts or goes into liquidation (in either case otherwise than for the purpose of amalgamation or reconstruction), or has a winding up or bankruptcy order made against it, or it has appointed to it an administrator or administrative receiver or any step analogous to any of the foregoing occurs.
- 13.3. The expiration or the termination of a Services Contract, however arising, shall not operate to affect such of the provisions of a Services Contract as are expressed to operate or continue in effect after then and shall be without prejudice to any rights or liabilities accrued at the date of such expiration or termination.

14. No Waiver, Partnership or Joint Venture

- 14.1. No waiver by a Party of any breach by another Party in the performance of any of its obligations under this Agreement shall operate or be construed as a waiver of any other or further breach whether of a like or different character or be effective unless in writing duly executed by an authorised representative of the affected Party.

- 14.2. The failure by a Party to insist on any occasion upon the performance of the terms, conditions and provisions of the Services Contract, or time or other indulgence granted by one Party to another shall not thereby act as a waiver of any breach, as acceptance of any variation, or as the relinquishment of any right under the Services Contract, which shall remain in full force and effect.
- 14.3. A Services Contract shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party.

15. Entire Agreement

- 15.1. These terms and conditions together with Quotation shall constitute the entire agreement and understanding of the Parties as to the subject matter of the Services Contract. They supersede any prior agreement or understandings between the Parties and no variation of shall be binding unless agreed in writing.
- 15.2. The Client expressly acknowledges that it has not been induced to enter into a Services Contract by any warranty or representation or other assurance not expressly incorporated into the Services Agreement or Quotation.

16. Severability

- 16.1. If any provision of the Terms and Conditions or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of the Terms and Conditions shall not be impaired.

17. Contracts (Rights of Third Parties) Act 1999

- 17.1. NHBC may perform any of its obligations or exercise any of its rights under the Terms and Conditions through any subsidiary or associated company of NHBC or any holding company of NHBC or any subsidiary or associated company of such holding company but in all other respects no term of a Services Contract is intended for the benefit of a third party and the Parties do not intend that any term of a Services Contract shall be enforceable by a third party either under the Contracts (Rights of Third Parties) Act 1999.

18. Assignment

- 18.1. A Services Contract shall not be assigned or transferred by either Party without the prior consent of the other save that NHBC shall be entitled by writing to the Client to assign all or any of its rights under a Services Contract to any company in the same group of companies as NHBC or associated with NHBC.

19. Notices

- 19.1. Any notice or other information to be given by either Party to the other under a Services Contract shall be given by:
 - 19.1.1. delivering the same by hand; or
 - 19.1.2. sending the same by pre-paid registered post;
 - 19.1.3. to the Party's registered office address, or if not a company or limited liability partnership, at its place of business as recorded in the Services Agreement.
- 19.2. Any notice or information sent by post in the manner provided by Clause 19.1.2 which is not returned to the sender as undelivered shall be deemed to have been given on the second day after the envelope containing it was so posted; and proof that the envelope containing any such notice or information was properly addressed, pre-paid, registered and posted, and that it has not been returned to the sender, shall be sufficient evidence that the notice or information has been duly given.
- 19.3. Any notice or information sent by telex, facsimile transmission or comparable means of communication shall be deemed to have been duly given on the date of transmission, provided that a confirming copy is sent to the other Party at the address given in Clause 19.4 within 24 hours after transmission.
- 19.4. The address of either Party for service for the purposes of Clause 19 (but excluding legal proceedings) shall be that of its registered or principal office, or such other address as it may last have notified to the other Party in writing from time to time.

20. General Contract provisions

- 20.1. Each Party warrants that it has power to enter into a Services Contract and that it has obtained all necessary consents and/or approvals to do so.
- 20.2. The Services Contract shall inure to the benefit of, and be binding upon, the permitted successors and permitted assignees to the Parties.
- 20.3. Where the Client comprises two or more Parties their liability under a Services Contract shall be joint and several.
- 20.4. No actions or proceedings arising under or in respect of the Services Contract shall be commenced against NHBC after 6 years after the date of completion of a Services Contract, or such earlier date as may be prescribed by law.

21. Dispute Resolution and Governing Law

- 21.1. The Parties irrevocably submit to the exclusive jurisdiction of the English Courts, subject to the right of either Party to enforce a judgment obtained in the English Courts in any other jurisdiction.
- 21.2. The Terms and Conditions and Services Contract shall be governed by and construed in accordance with English Law.