

# Airway Simulation Limited

## General Terms and Conditions for Supply

### 1. Interpretation

- 1.1. In these General Terms and Conditions (the “**Terms**”):

“**Agreement**” means the Purchase Order and these Terms, including the Schedules to these Terms;

“**Airway**” means Airway Simulation Limited;

“**Airway IP**” has the meaning in clause 9.1;

“**Business Day**” means any day on which banks are open for business in Auckland, other than a Saturday, Sunday or public holiday;

“**Customer**” means the person named in the Purchase Order;

“**Delivery Date**” means the delivery date or dates for the Device set out in the Purchase Order;

“**Device**” means the Orsim<sup>®</sup> Bronchoscopy Simulator, which includes the components set out in Schedule 2 to these Terms;

“**Dispute**” has the meaning in clause 12.2;

“**Intellectual Property**” means all present and future intellectual and industrial property rights conferred by law, including all patents, trade marks, service marks, trade names, inventions, trade secrets, copyright, moral rights, product names, rights in a design, know-how, confidential information and all or any other intellectual property rights whether or not registered and all other similar property, any application or right to apply for registration of any of those rights and all renewals and extensions of those rights;

“**Hourly Rates**” means Airway’s standard hourly rates, which reflect the current market rates for the provision of the same goods or services (as applicable);

“**Limited Warranty**” means the warranty in clause 7.1;

“**Price**” means the purchase price for the Device as advised by Airway to Customer from time to time;

“**Purchase Order**” means an order for the Device issued by Customer under clause 2.2;

“**Recipient**” has the meaning in clause 9.3;

“**Site**” means Customer’s premises as specified in the Purchase Order;

“**Software**” means the software required for the operation of the Device.

“**Software Update**” means a new release of or change to the Software (which is designed to overcome errors or malfunctions in, or designed to improve the operation of, the current version of the Software);

“**Software Upgrade**” means a new version of the Software (which is designed to provide extra functionality to the Software);

“**Specifications**” means the specifications for the Device set out in Schedule 1; and

“**Third Party Component**” means any component of the Device supplied by third parties.

- 1.2. In the event of any conflict or inconsistency between these Terms and a Purchase Order, these Terms will prevail.

### 2. Scope and Term

- 2.1 Airway will supply the Device and Customer will pay for the Device on these Terms. Customer acknowledges and agrees that these Terms take precedence over any terms which may be offered by Customer (whether being Customer’s general terms of purchase, or terms added by Customer to the relevant purchase order, or otherwise). The only circumstance where any variation to these Terms will apply is where Airway has expressly agreed in writing to that variation.
- 2.2 Customer will purchase the Device by either making payment to Airway or placing a purchase order with Airway specifying:
- (a) Customer’s name and contact details;
  - (b) the requested delivery date for the Device, being not less than 60 days following the date of the Purchase Order; and
  - (c) the Site address.
- 2.3 Airway will supply the Device when payment of the Price has been made in accordance with clause 5.
- 2.4 This Agreement will commence on the date that the Purchase Order is accepted by Airway. This Agreement will continue in force until terminated in accordance with its provisions.
- ### 3. Delivery and Installation
- 3.1 Subject to clause 3.2, the Device will be delivered to Customer at the Site by Airway or its nominated carrier.

- 3.2 Subject to clause 2.3, Airway will use reasonable endeavours to deliver the Device on the Delivery Date.
- 3.3 Subject to any express agreement between the parties to the contrary:
  - (a) Customer will be responsible for the installation and provisioning of the Device; and
  - (b) where Airway agrees to provide training to Customer and its personnel in relation to use of the Device, Airway may charge Customer for such training at the Hourly Rates and for all expenses incurred in carrying out such training (including travel expenses).
- 3.4 Customer will, at its cost:
  - (a) provide reasonable access to the Site to Airway's personnel to the extent required to deliver the Device to Customer, to provide training and any other services;
  - (b) ensure the safety of the Site and notify Airway's personnel of any safety procedures to be followed at the Site; and
  - (c) manage its personnel to ensure that any training being provided by Airway is conducted efficiently.
- 3.5 Customer will indemnify Airway against any loss, liability, costs or expenses incurred by Airway as a result of:
  - (a) failure or delay by Customer to perform any of its obligations under clause 3.4;
  - (b) failure or refusal of Customer to take delivery of the Device on or after the Delivery Date;
  - (c) unreasonable delay in the provision of any training agreed under clause 3.3(b) as a result of Customer's acts or omissions.
- 3.6 Customer's liability under clause 3.5 will include liability for any costs incurred by Airway or levied by any supplier of Third Party Components in relation to storage, transportation or insurance for the Device or any components of the Device.
- 3.7 Where delivery of the Device is delayed by more than 30 days after the Delivery Date as a result of Customer's acts or omissions, the relevant Purchase Order will expire and Customer must issue a new Purchase Order for the Device.
- 3.8 Customer will use the Software provided as part of the Device in accordance with the terms and conditions of the software licence agreement (accessible within the Software or otherwise provided to Customer by

Airway) (**Software Licence**). By using the Device, Customer will be deemed to have read and agreed to the Software Licence.

- 3.9 Where a laptop computer is provided to Customer as part of the Device, Customer agrees that it will not connect the laptop computer to a network, the Internet, or any external storage devices or media (such as, but not limited to, a USB Flash drive or inserting a DVD-Rom) without Airway's prior written consent.
- 3.10 Where a laptop computer is provided to Customer as part of the Device, Customer agrees that it will not use that device to record protected health information.

#### **4. Risk and Ownership**

- 4.1 Risk in the Device passes to Customer on delivery.
- 4.2 Ownership of the Device does not pass to Customer until Customer has paid all amounts owing under this Agreement in full.

#### **5 Pricing and Payment**

- 5.1 Customer will pay Airway the Price in accordance with clause 5.4.
- 5.2 The Price will be increased by the amount of any GST, and other taxes, duties, freight charges and import licensing requirements which may be applicable together with any additional amounts for which Airway is entitled to payment under this Agreement, except to the extent that such amounts are expressly included in the Price.
- 5.3 Airway will invoice Customer for the Price on the date on which the Purchase Order is accepted by Airway. Any additional amounts for which Airway is entitled to payment under clause 3 will be invoiced in arrears at the end of each month.
- 5.4 Payment is due within 30 days following the date of invoice. All payments will be made in cleared funds without deduction or set-off.
- 5.5 Without prejudice to any other rights or remedies it may have, where any amount payable under this Agreement is overdue, Airway may, until payment is received in full, suspend the supply of the Device or any undelivered components of the Device, or any provision of services under this Agreement, and Customer will be liable on default for all legal costs and agency fees incurred in recovery of all overdue amounts.

#### **6 Submissions**

- 6.1 If Customer submits to Airway, in any form, any ideas, inventions, suggestions, concepts or other material

("Submissions"), Customer acknowledges and agrees that:

- (a) the Submissions will automatically become the property of Airway;
- (b) there is no obligation on Airway to keep the Submissions confidential; and
- (c) Airway may (without any compensation to Customer) use the Submissions for any purpose and in any way.

## 7 Limited Warranty

7.1 Subject to clause 7.4, Airway warrants that, for 24 months following the date of delivery of the Device to the Customer, the Device (excluding any Third Party Components) will:

- (a) be materially free from defects in materials and workmanship; and
- (b) comply with the Specifications in all material respects.

7.2 As Customer's sole remedy for breach of the Limited Warranty and subject to the provisions of this clause 7, Airway will at its election, either repair or replace the Device.

7.3 Where following inspection or testing by Airway any Device is found not to breach the Limited Warranty, Customer will reimburse Airway for all costs and expenses incurred by Airway in carrying out such inspection or testing.

7.4 The Limited Warranty is given subject to the following:

- (a) The Disclaimer of Liability for the Device contained in Schedule 3, and clauses 10 and 7.6 of these Terms.
- (b) Airway is not liable for any defect in the Device caused by fair wear and tear, abnormal or unsuitable conditions of use, use of the Device with any other product not approved by Airway, failure to use the Device in accordance with any user documentation provided by Airway, or any neglect or default of Customer or any third party.
- (c) Airway is not liable for any breach of the Limited Warranty:
  - i. unless it is notified in writing within 24 months of the date of delivery of the Device, and provided Airway has been given reasonable opportunity to inspect the Device;
  - ii. if the total Price for the Device has not been paid; or
  - iii. if the Device has been altered by any person without Airway's prior written consent.

7.5 The Limited Warranty does not extend to any Third Party Components, in respect of which Customer will only be entitled to the benefit of any warranties given to Airway by the suppliers of such Third Party Components. Airway will use reasonable endeavours to assign to Customer any warranties received from such suppliers and will give reasonable assistance (at Customer's cost) to enforce such warranties on Customer's behalf.

7.6 Customer acknowledges that:

- (a) the Device and any services supplied to Customer under this Agreement are supplied for business purposes and the Consumer Guarantees Act 1993 does not apply to such supply; and
- (b) all warranties implied by statute, common law or otherwise are excluded.

## 8. Software Updates

8.1 For 24 months from the date of delivery of the Device, Airway will provide Customer with Software Updates as they become available. After this 24 month period, Airway may provide Software Updates to Customer at an additional charge.

8.2 Airway may provide Customer with Software Upgrades as they become available at an additional charge.

8.3 Customer will be responsible for installing the Software Updates and the Software Upgrades. If Airway agrees to install the Software Updates and/or the Software Upgrades, Airway may charge Customer for such work at the Hourly Rates and for all expenses incurred in carrying out such work.

## 9 Intellectual Property and Confidentiality

9.1 Customer acknowledges that Airway Limited is the owner of all Intellectual Property rights and other proprietary rights in the Device, the Software and the Specifications ("**Airway IP**"). Airway grants to Customer a non-exclusive, royalty-free, non-transferable sub-licence to use the Airway IP only to operate the Device for its internal business purposes.

9.2 Customer undertakes not to reproduce, replicate, translate, decompile, disassemble, reverse-engineer, adapt or modify the Device or to allow any 3rd party known to the Customer to undertake any of the above.

9.3 Each party ("**Recipient**") will keep confidential all information obtained from the other which is marked confidential or is by its nature clearly confidential and,

except as permitted by clauses 9.4 and 9.5, will not disclose the same to any third party without the written consent of the other party. For the purposes of this clause, the Software and the terms of this Agreement are confidential information.

- 9.4 The Recipient may disclose confidential information to those of its employees, agents and contractors who are directly involved in the Recipient's performance under this Agreement and which owe obligations of confidentiality to the Recipient.
- 9.5 The obligations of confidentiality set out in clause 9.3 will not apply to information that:
- (a) the Recipient can show was independently obtained from a third party having the right to disclose it;
  - (b) enters the public domain through no fault of the Recipient or any other person to whom it discloses the information; or
  - (c) the Recipient is obliged by law to disclose, provided that it has first advised the other party of this obligation, has allowed the other party reasonable time to avoid the disclosure having to be made, and has given the other party such assistance (at the other party's cost) as the other party reasonably requests in doing this.

## **10 Limitation of Liability**

- 10.1 Under no circumstances will Airway be liable (subject to any statutory requirement in the relevant jurisdiction) for any direct damages in excess of the Price of the Device (whether cumulatively, or for a single event).
- 10.2 Under no circumstances will Airway be liable (subject to any statutory requirement in the relevant jurisdiction) to the Customer or any other party for any costs, losses, expenses or damages, of an indirect, consequential, special, exemplary, punitive, or economic or financial nature (including (but not limited to) any interruption, loss of use, loss of profits or goodwill) or any personal losses such as personal injury, wrongful death, or medical negligence (whether they arise in negligence, tort, breach of contract or otherwise) in any way:
- (a) in connection with this Agreement;
  - (b) relating to the Customer's use of the Device; or
  - (c) due to any delay in delivery of the Device.

- 10.3 These limitations apply even if the Device is used in accordance with the terms of this Agreement and all instructions relating to it.

## **11 Termination**

- 11.1 Either party may immediately terminate this Agreement by notice in writing to the other party at any time where the other party:
- (a) breaches any obligation under this Agreement that is capable of remedy and fails to remedy such breach within 10 Business Days after notice from the first party requiring the breach to be remedied;
  - (b) breaches any obligation under this Agreement that is not capable of remedy; or
  - (c) becomes insolvent or goes into liquidation or bankruptcy or has a receiver or statutory manager appointed over any of its assets or ceases to carry on business or makes any composition or arrangement with its creditors.
- 11.2 Clauses 9, 10, 11.3 and 12 will survive termination of this Agreement.
- 11.3 Termination of this Agreement will be without prejudice to the rights and obligations of the parties prior to termination. On termination of this Agreement:
- (a) Customer will pay to Airway all sums which have been invoiced and are outstanding; and
  - (b) Customer will not be entitled to a refund of any pre-paid portion of the Price.

## **12 Dispute Resolution**

- 12.1 If a dispute arises under this Agreement, neither party may commence any court or arbitration proceedings relating to the dispute unless it has complied with the following provisions of this clause 12, except where the party seeks urgent interlocutory relief.
- 12.2 The party claiming a dispute (the "**Dispute**") has arisen under this Agreement must give written notice to the other party specifying the nature of the Dispute.
- 12.3 On receipt of that notice by the other party, both parties must endeavour in good faith to resolve the Dispute first through their respective representatives and secondly through informal dispute resolution techniques such as mediation, expert evaluation or determination or similar techniques agreed by them.

12.4 If the Dispute is not resolved within 15 Business Days of the notice being given pursuant to clause 12.2 (or within such further period agreed in writing by the parties), either party may, by giving notice in writing to the other party, refer the Dispute to mediation. The mediator will be appointed jointly by the parties or, where the parties cannot agree on a mediator within 5 Business Days of a party referring the Dispute to mediation, appointed by the Chair of LEADR New Zealand Incorporated (or the Chair's nominee). The costs and expenses of the mediator will be shared by the parties equally.

### 13 General

13.1 Each notice or other communication under this Agreement is to be made by email, personal delivery or by post to the addressee at the relevant email address or postal address, and is to be marked for the attention of the person or office holder (if any) from time to time designated for the purpose by the addressee to the other party.

13.2 No communication is to be effective until received. A communication will, however, be deemed to be received by the addressee:

- (a) in the case of an email, on the day on which it is sent to the correct email address or, if sent on a non-Business Day or after 5pm, on the next Business Day;
- (b) in the case of personal delivery, when delivered; and
- (c) in the case of a letter, 2 Business Days after posting or, in the case of an overseas postal address, 10 Business Days after posting.

13.3 Airway will not be liable to Customer for any breach or failure to perform any of its obligations under this Agreement where such breach is caused by any cause beyond its reasonable control (**force majeure event**). Airway will use all reasonable endeavours to mitigate the force majeure event. If the force majeure event continues for more than 90 days, either party may terminate this Agreement immediately.

13.4 No amendment to this Agreement will be effective unless it is in writing and signed by both parties.

13.5 Customer may not assign its rights or obligations under this Agreement to any other person without Airway's prior written consent.

13.6 This Agreement constitutes the entire understanding and agreement of the parties relating to the subject matter of this Agreement and supersedes and extinguishes all prior agreements and understandings between the parties relating to such matter.

13.7 This Agreement may be executed in two or more counterparts each of which will be deemed an original, but all of which together will constitute one and the same instrument.

13.8 This Agreement is subject to the laws of New Zealand and the parties submit to the exclusive jurisdiction of the New Zealand Courts.

## Airway Simulation Limited

### General Terms and Conditions for Supply

#### Schedule 1: Specifications

Specifications related to the Device Components are as follows:

- The laptop computer is a PC running Windows 7 or Windows 8 with at least 8GB of RAM and a high performance video card approved by Airway Simulation Limited.
- The Sensor unit is a low-power USB 2.0 device.
- The Software is designed to work on a PC running Windows 7 or Windows 8 with at least 8GB of RAM and 10GB of free HDD space with a high performance video card approved by Airway Simulation Limited.

#### Schedule 2: Device Components

In consideration for the payment of the Price, Airway will supply the Device, which includes the following components:

- hardware
- licence to use the current version of the Software
- container
- connecting cables
- laptop computer (to be supplied by a third party)
- Software Updates (but only in accordance with clause 8.1)

For the avoidance of doubt, the provision of Software Upgrades will be subject to an additional charge.

#### Schedule 3: Disclaimer of Liability for the Device

**Use of the Device:** The Device is designed solely for medical training and educational purposes and must only be used for the simulation, instruction and training of medical procedures. The Device must never be used for diagnostic, therapeutic or clinical purposeSFs. If the Customer uses the Device for any other purpose, the Customer's rights and licence to use it will automatically be revoked immediately. The Device is merely one specific component of, and is not a substitute for, proper medical training. The Customer must not use the Device as a substitute for employing best medical practice or correct medical procedure.

**The Customer's Requirements:** The Device is a generic simulator display only. It is not an exact replica of human organs or a substitute for a human patient. The Device does not simulate all organs or cover all pathological conditions or their treatment, nor does it advocate any one method or supplier of medical treatment over any others. The Customer alone is solely responsible for the correct use and application of the Device and for determining its suitability for the Customer's particular requirements. The Customer's use of

the Device, and reliance on it (or any information provided about it) is entirely at the Customer's own risk.

**Warranties:** The Device has been designed and manufactured to the highest standards, but Airway gives no representations or warranties that the Device will be completely accurate or realistic in every respect, that it will operate uninterrupted and error free at all times, or that it will be suitable for all of the Customer's specific needs or perform every function the Customer requires. The Device is supplied solely on the basis of the warranties contained in the Terms, Airway's Limited Warranty and Support Terms and Airway's End User Software Licence (unless the parties specifically agree in writing that other warranties will prevail, in accordance with clause 2.1 of the Terms) and to the maximum extent permitted by law, Airway disclaims all other representations and warranties, whether express or implied (under statute or otherwise), including anything implied resulting from the Customer's dealings with Airway or the Device's use by, or performance for, the Customer.

**Airway's Limitation of Liability:** Under no circumstances will Airway be liable (subject to any statutory requirement in the relevant jurisdiction) for any direct damages in excess of the Price (whether cumulatively, or for a single event). Under no circumstances will Airway be liable (subject to any statutory requirement in the relevant jurisdiction) to the Customer or any other party for any costs, losses, expenses or damages, of an indirect, consequential, special, exemplary, punitive, or economic or financial nature (including, but not limited to, any interruption, loss of use, loss of profits or goodwill) or any personal losses such as personal injury, wrongful death, or medical negligence (whether they arise in negligence, tort, breach of contract or otherwise) related in any way to the Customer's use of the Device. These limitations apply even if the Device is used in accordance with the terms of this Agreement and all instructions relating to it.

**The Customer's Agreement:** By using the Device, the Customer agrees that they accept, and agree to be bound by this disclaimer, all terms and conditions on which Airway have provided the Device, and all written instructions and literature (including as updated) accompanying or provided in relation to the Device.