

Essex Marine Consultants Terms of Business

IT IS AGREED that:-

- A. These Essex Marine Consultants Terms of Business shall form part of the Agreement between the Surveyor and the Client; and**
- B. The Surveyor shall perform the Scope of Work as set out in the Agreement subject to the following terms:**
- 1. Services**
- 1.1 The Surveyor shall undertake the services to which these terms relate with reasonable care, skill and diligence.
- 1.2 The Client's instructions and the scope of the Surveyor's services hereunder, are as defined in the Scope of Work. Any subsequent changes or additions to the Scope of Work must be agreed in writing by the Parties.
- 1.3 The Client undertakes to:
- 1.3.1 ensure that full instructions are given to the Surveyor and are provided in sufficient time to enable the required services to be performed effectively and efficiently. The Client agrees to disclose to the Surveyor all relevant information of which they have knowledge, or to which they have access, in relation to the Vessel to be surveyed;
- 1.3.2 in consultation with the Surveyor, procure all necessary access to premises and vessels (including lift-out, trials and facility for inspection ashore and afloat as appropriate) for no less than such a time as shall in each particular circumstance be reasonable to enable all appropriate inspections and tests to be undertaken or performed; and
- 1.3.3 ensure that all appropriate safety measures are taken to provide safe and secure working conditions provided always that in the event of any breach of the requirements of Clauses 1.3.1 to 1.3.3 causing any failure on the Surveyor's part to undertake the Scope of Work the Client shall be responsible for all consequential costs incurred by the Surveyor and in respect of any element of the Scope of Work undertaken.
- 1.4 Pursuant to the Scope of Work, the Surveyor will inspect the Vessel as thoroughly as is practicable and endeavour to comment on the more important items where, in the Surveyor's reasonable opinion, major costs consequences are considered likely to arise. It follows that the Surveyor cannot comment on every minor matter but the Surveyor will try to point out where small factors may become more serious.
- 1.5 The Surveyor's intention is to report on the condition of the hull(s), superstructure and fixtures (if any) of the Vessel so far as can reasonably be ascertained from a visual inspection of the Vessel at its location at the time of survey. The Client accepts that the Surveyor's survey report(s) cannot cover hidden, unexposed or inaccessible areas of the Vessel, neither can the Surveyor undertake to investigate areas that the Surveyor believes to be inaccessible at the time of inspection. Where the Surveyor is unable to gain access to areas commonly accessible, the Surveyor will endeavour to point this out.
- 1.6 In every case, the Surveyor recommends a full survey of a Vessel, to include inspection of the Vessel while lifted out and while in the water. Where the Surveyor accepts instructions to survey a Vessel solely on the basis of an inspection of the Vessel out of the water, the Surveyor makes no representation and gives no warranty as to the watertight integrity or buoyancy of the Vessel.

2. Valuations

2.1 All valuation work undertaken shall be in accordance with the Scope of Work and, unless otherwise stated in writing, such work relates solely to the date and place referred to. Valuations are based on opinions only and are not representations of fact, nor do they carry with them any guarantee of the particulars or information on which opinions are based. Valuations assume a willing buyer and willing seller and market conditions applicable at the time of valuation or such other date as is expressly referred to.

3. Fees

3.1 The fee agreed between the Surveyor and the Client for the services to be provided by the Surveyor under this Agreement ("the Survey Fee") shall not include the costs of travel, subsistence and accommodation which will be charged in addition and in accordance with this Clause 3.

3.2 The Survey Fee and all expenses shall become due and payable on such terms and in such amounts as shall be agreed from time to time. VAT or other EU equivalent shall be payable, if applicable, in addition to all fees and expenses. Invoices will be submitted in respect of all fees and expenses when due and the amount of each invoice shall be settled within 28 days of the date of the invoice. Thereafter, interest shall be payable on all sums owing and unpaid at a rate of 3% over Barclays Bank plc (London) base rate.

4. Limitations

4.1 The Surveyor shall not be liable under this Agreement for any loss or damage caused in circumstances (i) where there is no breach of a legal duty of care owed to the Client by the Surveyor or (ii) where, notwithstanding any such breach, any loss or damage is not a reasonably foreseeable result of such breach.

4.2 All services and reports are provided for the Client's use only. No liability of any nature is assumed towards any other party and nothing in these terms, or the relationship between the Surveyor and the Client, shall confer or purport to confer on any third party a benefit or the right to enforce any provision of these terms. The provisions of the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement and any person who is not a party to this Agreement shall have no right under that Act to enforce any term(s) of this Agreement.

4.3 The Surveyor shall not be responsible for loss or damage or any increase in loss or damage resulting from any material breach by the Client of any term of this Agreement.

4.4 Any claim by the Client in respect of any breach of the Surveyor's obligations under this Agreement must be notified to the Surveyor as soon as is reasonably practicable after the Client becomes aware of the breach. Where any breach is capable of remedy, the Surveyor must be afforded a reasonable opportunity to put matters right at his expense.

4.5 The Client agrees that, for reasons of commercial practicality, it is necessary to limit the Surveyor's potential liability in respect of loss or damage suffered by the Client as a result of any breach by the Surveyor of any of the Surveyor's obligations under this Agreement. As such, the Client agrees that no liability howsoever arising whether under this Agreement or otherwise shall attach to the Surveyor except insofar as such liability is covered by the professional indemnity insurance referred to at paragraph 4.6 and such liability (including Claims Expenses) shall in any event be limited to £250,000 or such higher sum as the parties shall agree in writing prior to commencement of the services to which these terms relate (hereafter referred to as "the Agreed Indemnity Limit").

4.6 The Surveyor shall maintain professional indemnity insurance in the amount of the Agreed Indemnity Limit throughout the period of the performance of the Surveyor's duties hereunder provided that such insurance shall remain available at reasonable market rates.

4.7 The Surveyor's liability shall not extend to particulars, data and other information given to the Surveyor by others or obtained from outside sources, publications and the like reasonably relied upon by the Surveyor, including Class records, registry details or other such information and no assurances can be given regarding the accuracy of the same.

- 4.8 Unless otherwise stated in writing, all services and reports are provided on the basis that they carry no guarantee regarding ownership or title, freedom from mortgages or charges, debts, liens or other encumbrances, or vessel stability, performance or design.
- 4.9 The Client shall be responsible for any losses, expenses or other costs reasonably incurred by the Surveyor that are caused by a breach of the Client's obligations to the Surveyor hereunder.
- 4.10 The Surveyor shall not be liable in respect of any breach of his obligations hereunder resulting from unforeseeable causes beyond the Surveyor's reasonable control

Business or Commercial Operations

- 4.11 Notwithstanding any other provision of this Agreement, where the Client is acting in the course of a business or commercial operation:

- 4.11.1 the Surveyor's liability shall expire twelve months after the Survey Report is delivered to the Client and The Surveyor shall thereafter have no further liability whether in contract, tort or otherwise; and

- 4.11.2 the Surveyor shall have no liability whether in contract, tort or otherwise for:

- 4.11.2.1 any consequential or economic loss or for loss of profit or turnover or loss of use suffered by the Client howsoever arising, whether under this Agreement or otherwise, and without prejudice to the generality of the foregoing the Surveyor shall not be liable for any consequences of late performance of any survey and/or late delivery of any survey report;

- 4.11.2.2 any breach of his obligations hereunder of which written notification shall not have been given within 14 days of the date on which the Client ought reasonably to have become aware of the existence of such breach;

- 4.11.2.3 any loss, injury or damage sustained as a result of:

- i. any defect in any material or workmanship;
 - ii. an Act of God or other circumstances beyond the control of the Surveyor; or
 - iii. the act, omission or insolvency of any person other than the Surveyor;

- and the Surveyor shall have no liability to indemnify the Client in respect of any claim made against the Client for any such loss, injury or damage;

- 4.12 Notwithstanding any other provision of this Agreement:

- 4.12.1 unless otherwise stated in writing, no guarantee is given against faulty design, latent defects or of suitability of any vessel or other item for any particular purpose or of compliance with any particular local, national or international requirement or code, and opinions are given without the benefit of running of machinery or opening up or other dismantling whether of interior linings, machinery or other items or systems;

- 4.12.2 the Surveyor shall have no liability whether in contract, tort or otherwise in respect of the consequences of late, incomplete, inadequate, inaccurate or ambiguous instructions or the non-disclosure by the Client of relevant information.

5 Law and disputes

- 5.1 This Agreement shall be construed in accordance with and shall be governed by English law. All disputes arising out of or in connection with this Agreement shall be submitted to the exclusive jurisdiction of the Courts of England and Wales.

6. Miscellaneous

- 6.1 The Surveyor may terminate the appointment forthwith if the Client fails for more than 28 days to pay any sum due when demanded, or if the Client fails to respond promptly to requests for information and/or instructions and fails adequately to respond to 28 days' formal notice of such failure, without prejudice to the Surveyor's accrued rights.
- 6.2 Without prejudice to the accrued rights of the other party, either party may terminate the appointment forthwith by notice if the other party shall become bankrupt or insolvent, or make any arrangement or composition for the benefit of creditors, or have anything analogous to any of the foregoing under the laws of any jurisdiction occur to it, or cease (or threaten to cease) to carry on business.
- 6.3 No exercise or failure to exercise or delay in exercising any right or remedy vested in either party shall be deemed to be a waiver by that party of that or any other right or remedy.
- 6.4 Neither party shall transfer or assign its rights or obligations under these terms without the prior written consent of the other.
- 6.5 In the event that any provision of these terms is held to be a violation of any applicable law, statute or regulation, such provision shall be deemed to be deleted from these terms and shall be of no force or effect and these terms shall remain in full force and effect as if such provision had not been contained herein. Notwithstanding this, in the event of any such deletion the Parties shall negotiate in good faith in order to agree the terms of an acceptable alternative provision.
- 6.6 Except where expressly stated to the contrary in a written document signed by the Parties on or after the date hereof, these terms form the entire agreement between the Parties and supersede all previous agreements and understandings between the Parties, and no warranty, condition, description, term or representation is given or to be implied by anything said or written in negotiations between the Parties or their representatives prior to the communication of these terms.
- 6.7 References to "the Surveyor" include the Surveyor's employees and persons, firms and companies appointed or engaged by the Surveyor as the Surveyor's agents for carrying out any work or services under these terms, all persons, firms and companies to whom performance of any work or services under these terms is sub-contracted or delegated by the Surveyor, and all agents and employees of persons, firms and companies referred to in this clause.
- 6.8 Any communication required to be given under these terms by either party shall be in writing and shall be sufficiently given either by letter, fax or electronic mail (provided the same is capable of being recorded by the recipient in durable form) sent to the other at the contact details previously notified and any such notice shall be deemed to have been given at the time at which it would in the ordinary course of transmission have been received.
- 6.9 Each party undertakes to maintain the confidentiality of all information supplied by the other and not to divulge such information to third parties without the prior written authority of the other.

Words denoting the masculine include the feminine and neuter and vice versa.
