1. INTERPRETATION

1.1 In this Agreement the following words and phrases shall have the following meanings unless the context otherwise requires:

(a) Affiliates means any entity that directly or indirectly controls, is controlled by, or is under common control with another entity;

(b) Agreement means this Agreement entered into between Intertek and the Client;

(c) App means an Application as defined in Clause 3.3;

(d) Audio-visual Information means all information in whatever form or manner presented which (i) is disclosed pursuant to, or in the course of the provision of Services pursuant to, this Agreement; and (ii) is disclosed in writing, electronically, visually, orally or otherwise howsoever and is marked, stamped or identified by any means as confidential by the disclosing party at the time of disclosure; and (iii) is information, however disclosed, which would reasonably be expected to be confidential by the recipient carrying out the obligation;

(e) Intellectual Property Rights means copyrights, trademarks, patents, patent applications (including the right to apply for a patent), service marks, design rights, trade secrets and other proprietary rights to any invention;

(f) Report(s) shall mean any memoranda, laboratory data, calculations, measurements, estimates, notes, certificates and other material prepared by the Supplier in the course of providing the Services to the Client or for any other purpose of any communication in any form describing the results of any work or services performed;

(g) Services means the testing, assurance and inspection services as set out in clause 2 of this Agreement and refers to the Services as defined in the Proposal;

(h) The headings in this Agreement do not affect its interpretation.

2. THE SERVICES

2.1 Intertek shall provide the Services to the Client in accordance with (i) the limits of instructions received from the Client; and (ii) the content of the audit program as set out by Intertek or any applicable audit program of the Client, as applicable, and may comprise or include the provision by Intertek of a Report;

(i) Proposal means the description of our Services, and an estimate of our Charges, if applicable, provided to the Client;

(j) Remote Inspection means a form of visual inspection, conducted by the Inspector by directing the Client's suppliers to move to certain areas to allow the Inspector to carry out the audit remotely via a direct video link via an app or software technology;

(k) Inspector means Intertek inspector responsible for performance of the inspection services.

3. THE OblIGATIONS OF THE Client

3.1 The Client shall immediately upon receiving the Services shall acknowledge and agree that the Services are not to be used by the Client for any purposes except as set out in this Agreement and shall promptly inspect the Services and the work performed by Intertek and no representations or warranties are given to any other persons.

3.2 In the event of a breach of the warranty set out in Clause 3.1 (b), Intertek shall, at its own expense, perform services of the type originally performed as may be reasonably required to correct any defect in Intertek's performance.

3.3 Intertek makes no other warranties, express or implied. All other warranties, conditions and other terms implied by statute or common law (including but not limited to any implied warranties of merchantability and fitness for a particular purpose) are, to the fullest extent permitted by law, excluded from this Agreement. No performance, deliverables, oral or other information or advice provided by Intertek (including its agents, sub-contractors, employees or other representatives) will create a warranty or otherwise increase the scope of any warranty provided.

4. CLIENT WARRANTIES AND OBLIGATIONS

4.1 The Client warrants and represents that:

(a) that it has the power and authority to enter into this Agreement and procure the provision of the Services for itself. The Client hereby specifically represents that neither itself nor any of its affiliates or parties, nor will it, in any way be impeded by any sovereign government or internationally recognized organization (including without limitation the United Nations and the United States of America) upon the execution and during the terms of this Agreement, in particular the sanctions posted by the United States at http://www.treasury.gov/resource-center/sanctions/IOS-List/Default.aspx. For the purposes of this Agreement, an "affiliated party" means a party who controls the Client, is controlled by a third party who also controls the Client or jointly controls a third party with the Client in terms of shareholding, business management, labour relationship, agency, proxy, trust or otherwise;

(b) that it is securing the provision of the Services hereunder for its own account and not as an agent or broker, or in any other representative capacity, for any other person or entity;

(c) that all information, records and related documents (including but not limited to any clients or supplier books, code of ethics, internal policies, records (including employment records), information systems (or any of its agents or representatives) supplies to Intertek (including its agents, sub-contractors and employees) are, true, accurate representative, complete and is not misleading in any respect and made available when required by Intertek. The Client further acknowledges that Intertek will use all information, data, know-how and other materials provided by the Client (without any duty to confirm or verify the accuracy or completeness thereof) in order to provide the Services;

(d) that all samples provided by the Client to Intertek shall be shipped pre-paid and will be collected and disposed of by the Client (at the Client’s cost) within thirty (30) days or other specified period as per product nature after testing unless alternative arrangements are made by the Client. In the event such samples are not collected and disposed of within the required period, Intertek reserves the right to destroy the samples, at the Client’s cost;

(e) shall comply with Intertek’s request to conduct interviews, meetings or discussions with the Client’s personnel and the Client agrees that the Client’s suppliers for any reason the impact to the Services within the timeframe as agreed between the parties; and

(f) that any information, samples or other related documents (including without limitation certificates and reports) provided by the Client to Intertek will not, in any circumstances, infringe any legal rights (including Intellectual Property Rights) of any third party.

4.2 In the event that the Services are performed in a manner not consistent with the Client’s requirements or instructions, the Client shall cause any such third party to acknowledge and agree to the provisions in this Agreement and the Proposal prior to and as a condition precedent to such third party receiving any Reports or the benefit of any Services.

4.3 The Client and its suppliers further agrees:

(a) to co-operate with Intertek in all matters relating to the Services and appoint a manager in relation to the Services who shall be duly authorised to provide instructions to Intertek on behalf of the Client and to bind the Client contractually as required;

(b) to provide instructions and feedback in due time to enable Intertek to perform the Services in a timely manner as agreed between the parties;

(c) to provide Intertek (including its agents, sub-contractors and employees) with access to its premises as may be reasonably required for the provision of the Services and to any other relevant premises at which the Services are to be provided;

(d) prior to Intertek attending any premises for the performance of the Services, to inform Intertek of all applicable safety and health rules and regulations and other reasonable security requirements that may apply to any relevant Client premises, including all necessary locks, keys or security systems at its premises or otherwise necessary for the provision of the Services;

(e) to inform Intertek in advance of any applicable import/ export restrictions including but not limited to any USA-based export and/or import regulations and the Export Administration Regulations (EAR), that may apply to the Services and/or any Confidential Information to be provided, including any instances where any products, information or technology may be exported/ imported or to from a country that is restricted or banned from such transaction;

(f) in the event of the issuance of a certificate, to inform and advise Intertek immediately of any changes during the term of the certificate which may have a material impact on the accuracy of the certification;

(g) to obtain and maintain all necessary licenses and consents in order to comply with relevant legislation and regulation in relation to the Services;

(h) that it will not use any Reports issued by Intertek pursuant to this Agreement in a misleading manner thereof and that it will only use such Reports to the extent that the Client is secured of confidentiality by the disclosing party at the time of the issuance thereof;

(i) in no event, will the content of any Reports or any extracts, excerpts or parts of any Reports be distributed or published without the prior written consent of Intertek (such consent not to be unreasonably withheld).

(j) shall not suspend any Services for more than five (5) days and shall pay Intertek each day of suspension the Inspectors day rate and any other expenses for the duration of the suspension;

(k) that shall not use any Intellectual Property, including but not limited to any trademark, and branding for any advertising and promotional material or any statements made by the Client or use of the Services without the prior written consent of Intertek.

4.4 Intertek shall be neither in breach of this Agreement nor liable to the Client for any breach of this Agreement if and to the extent that its breach is a direct result of a failure by the Client to comply by the Client to comply with the obligations as set out in this Agreement and any failure by the Client to carry out its obligations set out herein on the provision of the Services by Intertek will not affect the Client’s obligations under this Agreement for payment of the Charges pursuant to Clause 5 below.

5. CHARGES, INVOICING AND PAYMENT

5.1 The parties agree that the Services are provided on the terms and subject to the conditions set out in this Agreement, and that this Agreement supersedes any other terms and conditions which the Client has provided or may in the future provide to Intertek, whether in a purchase order or any other document.
5.2 The Client shall pay Intertek the charges as set out in any Proposal or otherwise agreed in writing (the Charges).

5.3 Charges shall be charged for services that are not included in the Proposal and for additional costs (including any travel and accommodation costs) as reasonably incurred and/ or paid by the Client.

5.4 The Charges are expressed exclusive of VAT and any other applicable taxes. If a withholding Intertek shall provide the Client with a quote price including the applicable withholding tax. The Client shall pay the Charges on the date specified in the manner prescribed by law, within thirty (30) days of the issue by Intertek of a valid invoice.

5.5 The Client agrees that it will reimburse Intertek for any expenses incurred by Intertek relating to the performance of the Services and is wholly responsible for any freight or customs clearance fees relating to any testing samples.

5.6 The Charges represent the total fees to be paid by the Client for the Services pursuant to this Agreement. Any additional work performed by Intertek will be charged on a time and material basis.

5.7 Intertek will issue an electronic invoice to the Client each month as the Services progress. An electronic invoice will be deemed to be sent by Intertek to the Client upon receipt of such email. Intertek is under no obligation to fulfill any request by the Client for a paper invoice. A request for a paper invoice sent by post will include HKD 250 administration fee and the paper invoice must be paid by the Client within the credit terms referred to in 5.5 above.

6.1 All Intellectual Property Rights belonging to a party prior to entry into this Agreement shall remain vested in that party.

6.2 Any use by the Client (or its Affiliates) of the name “Intertek” or any of Intertek’s trademarks or brand names for any marketing, media or publication purposes must be prior approved in writing by Intertek. Intertek reserves the right to terminate this Agreement immediately as a result of any such unauthorised use.

6.3 In the event of provision of certification services, Client agrees and acknowledges that the use of the report and/or Certificates of Conformity and/or Quality Marking must comply with all relevant standards and regulations.

6.4 All Intellectual Property Rights in any Reports, document, graphs, charts, photographs or any other material [in whatever medium] produced by Intertek pursuant to this Agreement shall belong to Intertek. Intertek reserves the right to use any such Reports, document, graphs, charts, photographs or other material for the purposes of this Agreement.

6.5 The Client agrees and acknowledges that Intertek retains any and all proprietary rights in concepts, ideas and inventions that may arise during the preparation or provision of any of the Services (including any deliverables provided by Intertek to the Client) and the provision of the Services to the Client.

6.6 Both parties shall observe all statutory provisions with regard to data protection including but not limited to the provision of the General Data Protection Regulation 2016/679 (“GDPR”) and shall comply with all applicable requirements of the GDPR. The Client warrants that the consent of their direct and/or contracted personnel has been obtained prior to any commencement of the Services. The Client shall indemnify and hold harmless Intertek, its officers, employees, agents, representatives, contractors and sub-contractors from and against any and all claims, suits, liabilities (including cost of litigation and attorney’s fees) arising, directly or indirectly, out of or in connection with its noncompliance with Data Protection Law and any breach of its obligations as set out in this clause 6.6.

7. CONFIDENTIALITY

7.1 By entering into the (Receiving Party) or if it has any failure or delay caused by the (Receiving Party) or if it has any failure or delay caused by the (Receiving Party) under this Agreement and signed by an authorised signatory of each party.

9. FORCE MAJEURE

9.2 A party shall be liable to the other for any delay in performing or failure to perform any obligation under this Agreement to the extent that such delay or failure to perform is a result of:

(a) war [whether declared or not], civil war, riots, revolution, acts of terrorism, military action, blocking of payment channels, or economic sanctions or embargoes (whether environmental, political or otherwise);

(b) natural disasters such as violent storms, earthquakes, tidal waves, floods and/or lighting; explosives and fires;

(c) strike, lockout or other industrial disputes, or any event that, if it has occurred, would affect a party’s performance or delaying or preventing performance or delaying the performance of the Services, or causing any Report arising from the Services to be produced in a manner different from the one agreed in the Proposal, or Intertek being unable to perform any of its obligations under this Agreement.

9.3 A party whose performance is affected by an event described in Clause 9.1 (a Force Majeure Event) shall:

(a) promptly notify the other party in writing of the Force Majeure Event and the cause and the likely duration of any consequential delay or non-performance of its obligations;

(b) use all reasonable endeavours to avoid or mitigate the effect of the Force Majeure Event and continue to perform or resume performance of its affected obligations as soon as reasonably possible;

(c) continue to provide Services that remain unaffected by the Force Majeure Event.

9.4 If the Force Majeure Event continues for more than sixty (60) days after the day on which it started, each party may terminate this Agreement by giving at least ten (10) days’ written notice to the other party.

10. LIMITATIONS AND EXCLUSIONS OF LIABILITY

10.1 Neither party excludes or limits liability to the other party:

(a) for death or personal injury resulting from the negligence of that party or its directors, officers, employees, agents or sub-contractors; or

(b) for any financial loss or damage or costs or expenses or loss, or for death or personal injury, arising out of the use or disclosure; or

(d) in respect of which a party is Intertek any failure or delay caused by the (Receiving Party) under this Agreement and signed by an authorised signatory of each party.

10.2 Subject to Clause 10.1, the maximum aggregate liability of Intertek in contract, tort (including negligence and breach of statutory duty) or otherwise for any breach of this Agreement or any matter arising out of or in connection with the Services to be provided in accordance with this Agreement shall be the amount paid by the Client to Intertek or its subcontractors in respect of the Services performed in accordance to this Agreement.

10.3 Notwithstanding the above clause 10.2, Intertek shall not be liable in contract, tort [including negligence and breach of statutory duty], breach of warranty for any of the following:

(a) incidental or consequential loss or damage; or

(b) any indirect, special, general or consequential, punitive, or special loss [even when advised of its possibility]; or

(c) any indirect or consequential loss or damage resulting from any false, unclear, incomplete, or misleading information provided to Intertek; and

(d) the Clients failure to comply with requirements of any applicable law and regulation.

10.4 Any claim by the Client against Intertek must be made within ninety (90) days after the date on which the Client becomes aware of any circumstances giving rise to such a claim.

11. INDEMNITY

11.1 Except in cases of proven negligence or fraud by Intertek, the Client shall indemnify and hold harmless Intertek, its officers, employees, agents, Affiliates, contractors and sub-contractors from and against any and all claims, suits, liabilities (including costs of litigation and attorney’s fees) arising, directly or indirectly, out of or in connection with:

(a) any claims or suits by any regulatory body or governmental authority or others for any actual or alleged failure of the Client to comply with any law, ordinance, regulation, rule or order of any governmental or judiciary authority;

(b) any claims or suits for personal injuries, loss of life or damage to public property, economic loss, and loss or damage to Intellectual Property Rights incurred by or occurring to any person or entity and arising in connection with or related to the Services provided hereunder by Intertek, its officers, employees, agents, representatives, contractors and sub-contractors; or

(c) the breach or alleged breach by the Client of any of its obligations set out in Clause 4 above; or

(d) any claims made by any third party for loss, damage or expense of whatsoever nature and nature arising arising relating to the Services, performed, performed or non-performance of any Services to the extent that the aggregate of any such claims relating to any one Service exceeds the limit of liability set out in Clause 10 above; and

(e) any claims or suits arising as a result of, or in connection with, Intertek’s use or non-use or failure of any Reports issued by Intertek which may damage the goodwill or reputation of Intertek, including but not limited to any damage caused by the Client of the name “Intertek” or any of Intertek’s trademarks or brand names in any media, marketing or publication purposes without obtaining the prior written consent of Intertek.

11.2 The obligations set out in this Clause 11 shall survive termination of this Agreement.
12. INSURANCE POLICIES

12.1 Each party shall be responsible for the arrangement and costs of its own company insurance which includes, without limitation, professional indemnity, employer’s liability, motor insurance and property insurance.

12.2 Intertek expressly disclaims any liability to the Client as an insurer or guarantor.

12.3 The Client acknowledges that although Intertek maintains employer’s liability insurance, such insurance does not cover any employees of the Client or any third parties who may be involved in the provision of the Services. If the Services are to be performed at premises belonging to the Client or third parties, Intertek’s employer’s liability insurance does not provide cover for non-Intertek employees.

13. TERMINATION

13.1 This Agreement shall commence upon the first day on which the Services are commenced and shall continue, unless terminated earlier in accordance with this Clause 13, until the Services have been provided.

13.2 This Agreement may be terminated by:

(a) either party if the other continues in material breach of any obligation imposed upon it hereunder for more than thirty (30) days after written notice has been dispatched by that party by recorded delivery or courier requesting the other to remedy such breach;

(b) Intertek on written notice to the Client in the event that the Client fails to pay any invoice by its due date and/or fails to make payment after a further request for payment, or if the Client or any of its affiliated party is / becomes a sanctioned party as per Clause 4.1 (a) of this Agreement during the term of this Agreement or extension / renewal thereto; or

(c) either party on written notice to the other in the event that the other makes any voluntary arrangement with its creditors or becomes subject to an administration order or (being an individual or firm) becomes bankrupt or (being a company) goes into liquidation (otherwise than for the purposes of a solvent amalgamation or reconstruction) or an encumbance takes possession, or a receiver is appointed, of any of the property or assets of the other or the other ceases, or threatens to cease, to carry on business.

13.3 In the event of termination of the Agreement for any reason and without prejudice to any other rights or remedies the parties may have, the Client shall pay Intertek for all Services performed up to and including date of termination. This obligation shall survive termination or expiration of this Agreement.

13.4 Any termination or expiration of the Agreement shall not affect the accrued rights and obligations of the parties nor shall it affect any provision which is expressly or by implication intended to come into force or continue in force on or after such termination or expiration.

14. ASSIGNMENT AND SUB-CONTRACTING

14.1 Intertek reserves the right to delegate the performance of its obligations hereunder and the provision of the Services to one or more of its Affiliates and/or sub-contractors when necessary. Intertek may also assign this Agreement to any company within the Intertek group on notice to the Client.

15. GOVERNING LAW AND DISPUTE RESOLUTION

15.1 This Agreement and the Proposal shall be governed by the laws of the Hong Kong Special Administrative Region, China. Any dispute, controversy or claim arising from or in connection with this Agreement and/or the Proposal (including any non-contractual claim relating to the provision of the Services in accordance with this Agreement) shall firstly be resolved through negotiation between Intertek and the Client. If resolution cannot be reached within thirty (30) days, either party may submit the dispute, controversy or claim to the Hong Kong International Arbitration Centre (“HKIAC”) for arbitration which shall be conducted in Hong Kong SAR in accordance with arbitration rules of HKIAC. The arbitral award is final and binding upon both parties. For the avoidance of doubt, this clause shall not prohibit a party to this Agreement to seek relief from the Courts of Hong Kong SAR.

16. MISCELLANEOUS

16.1 Severability

If any provision of this Agreement is or becomes invalid, illegal or unenforceable, such provision shall be severed and the remainder of the provisions shall continue in full force and effect as if this Agreement had been executed without the invalid illegal or unenforceable provision. If the invalidity, illegality or unenforceability is so fundamental that it prevents the accomplishment of the purpose of this Agreement, Intertek and the Client shall immediately commence good faith negotiations to agree an alternative arrangement.

No partnership or agency

16.2 Nothing in this Agreement and no action taken by the parties under this Agreement shall constitute a partnership, association, joint venture or othre co-operative entity between the parties or constitute any party the partner, agent or legal representative of the other.

16.3 Waivers

Subject to Clause 10.4 above, the failure of any party to insist upon strict performance of any provision of this Agreement, or to exercise any right or remedy to which it is entitled, shall not constitute a waiver and shall not cause a diminution of the obligations established by this Agreement. A waiver of any breach shall not constitute a waiver of any subsequent breach.

16.4 No waiver of any right or remedy under this Agreement shall be effective unless it is expressly stated to be a waiver and communicated to the other party in writing.

Whole Agreement

16.5 This Agreement and the Proposal contain the whole agreement between the parties relating to the transactions contemplated by this agreement and supersede all previous agreements, arrangements and understandings between the parties relating to those transactions or that subject matter. No purchase order, statement or other similar document will add to or vary the terms of this Agreement.

16.6 Each party acknowledges that in entering into this Agreement it has not relied on any representation, warranty, collateral contract or other assurance (except those set out or referred to in this Agreement) made by or on behalf of any other party before the acceptance or signature of this Agreement. Each party waives all rights and remedies that, but for this Clause, might otherwise be available to it in respect of any such representation, warranty, collateral contract or other assurance.

16.7 Nothing in this Agreement limits or excludes any liability for fraudulent misrepresentation.

Third Party Rights

16.8 A person who is not party to this Agreement has no right under the Contracts (Rights of Third Parties) Ordinance [Cap. 623] to enforce any of its terms.

Further Assurance

16.9 Each party shall, at the cost and request of any other party, execute and deliver such instruments and documents and take such other actions in each case as may be reasonably requested from time to time in order to give full effect to its obligations under this Agreement.

Complaints

16.10 Intertek has complaint handling procedure for expression of dissatisfaction by any person or organization relating to the Services provided. The procedure can be provided on request.