

General Conditions of SALE of Goods & Services (including Software)

1 Interpretation

1.1. In these Conditions:

“Conditions” means these terms and conditions for the sale and purchase of Supplies which are incorporated into and form part of the Contract.

“Contract” means the contract between the Seller and the Purchaser (subject to the provisions of Clause 2) for the purchase and sale of the Supplies, comprising:-

- (i) the Seller’s quotation (including documents (if any) incorporated by express reference on the face of the quotation) and the acceptance thereof by the Purchaser; or
- (ii) the Order and the Seller’s acceptance thereof,

together with these Conditions and any written agreement pursuant to Clause 2.2.1.

“Deliver”, “Delivered” or “Delivery” means the act of:

- (iii) delivering or making available the Supplies on Purchaser’s premises or unless otherwise agreed in writing between Purchaser and Seller; or
- (iv) where assembly, installation, erection or commissioning of the Supplies at Site or otherwise is required, the Seller declaring that the Supplies are ready for acceptance.

“Delivery Date(s)” means the date or dates provided in the Contract, on which Delivery of the Supplies or instalments of the Supplies are to take place respectively; or the extended date or dates for the same pursuant to the notification issued by the Seller in accordance with Clause 6.11.

“Goods” means the goods (including any instalment of the goods or any parts of them) which the Seller is to supply in accordance with these Conditions and which may (without limitation) comprise or include Software.

“Order” means the written order placed by the Purchaser for the supply of the Goods and/or Services and documents (if any) incorporated by express reference on the face of the Order.

“Party” means the Seller or the Purchaser and “Parties” means both of them.

“Purchaser” means the person, firm or company who accepts a quotation of the Seller for the sale of the Goods and/or Services or who places the Order for the Goods and/or Services.

“Purchaser’s Default” means a default of the Purchaser in the manner described in Clause 6.12.

“Related Company” has the meaning given to that term in section 2(3) of the New Zealand Companies Act 1993 (read as if the expression “company” in that section included any body corporate wherever incorporated or established).

“Seller” means the company referred to on the face of the Order with whom the Contract is made by the Purchaser.

“Services” means the provision of work and/or other services which are the subject of the Contract that may (without limitation) comprise and include Software and which may relate to installation in accordance with these Conditions.

“Site” means the address for delivery, that part of the address for delivery where the Goods are to be installed and operated, or where any Services are to be performed (if applicable).

“Software” means the software and firmware items which are comprised or included in or related to the Supplies.

“Supplies” means Goods and/or Services.

- 1.2. Any reference in these Conditions to any provision of a statute and any regulations made in pursuance thereof as from time to time modified or re-enacted, whether before, on or after the date of the Contract, so far as such modification or re-enactment applies or is capable of applying to any transaction entered into prior to completion of the Contract (so far as liability thereunder may exist or can arise) shall be construed as a reference to that provision or regulation as amended, re-enacted or extended at the relevant time and shall include also any past statutory provision or regulation (as from time to time modified or re-enacted) which such provision or regulation has directly or indirectly replaced.
- 1.3. References to dollars, \$ or other monetary amounts specified in the Contract are references to New Zealand dollars, unless stated otherwise.
- 1.4. Any obligation on a Party under the Contract not to do anything will be deemed to include an obligation not to suffer, permit, or cause that thing to be done.
- 1.5. The words “include”, “including” and “includes” must always be read as being followed by the phrase “without limitation”.
- 1.6. The Contract and any provision in it must not be construed adversely to the Seller because the Seller prepared it or caused it to be prepared.
- 1.7. References to a “person” in the Contract include an individual, firm, company, corporation or unincorporated body of persons, any public, territorial or regional authority, any government, and any agency of any government or of any such authority.
- 1.8. The headings in these Conditions are for convenience only and shall be ignored in construing these Conditions and shall not affect their interpretation.
- 1.9. Words (including words defined in the Contract) importing the singular also include the plural and vice-versa where the context requires. The words “written” and “in writing” include any means of visible reproduction (including email).

2 Basis of the sale

- 2.1. The Seller shall sell and the Purchaser shall purchase the Supplies in accordance with the Contract.
- 2.2. In the event of any inconsistency between these Conditions and other documents forming part of the Contract, the following order of priority shall apply:
 - 2.2.1. Any already existing written agreement between the Parties as far as provisions in these Conditions are covered, or any written agreement where the Parties agree that any of the provisions in these Conditions should be superseded with an express reference to this Clause 2.2;
 - 2.2.2. The Seller’s quotation and documents (if any) incorporated by express reference on the face of the quotation;
 - 2.2.3. These Conditions; and
 - 2.2.4. The Order.
- 2.3. No variation to these Conditions shall be binding unless agreed in writing and signed by the authorised representatives of the Purchaser and the Seller. Any varying terms proposed by the Purchaser in its Order or any other document of the Purchaser shall not become part of the Contract.

3 Orders, Specifications and Cancellations

- 3.1. No Order shall be deemed to be accepted by the Seller unless and until confirmed in writing by the Seller’s authorised representative.
- 3.2. The Purchaser shall be responsible to the Seller for ensuring the accuracy of the terms of any Order (including any applicable specification).

- 3.3. The quantity, quality and description of and any specification for the Supplies shall be those set out in the Seller's quotation (if accepted by the Purchaser) or the Order (if accepted by the Seller). The Seller reserves the right to make any changes in the specification of the Supplies which are required to conform to any applicable statutory requirements or, where the Supplies are to be supplied to the Purchaser's specification, which do not materially affect their quality or performance.
- 3.4. No Order which has been accepted by the Seller may be cancelled, varied or suspended by the Purchaser except with the agreement in writing of the Seller and on terms that the Purchaser shall indemnify the Seller in full against all loss (including loss of profit), costs (including the cost of all labour and materials used), damages, charges and expenses incurred by the Seller as a result of the cancellation, variation or suspension.

4 Price

- 4.1. The price of the Supplies shall be the price stated in the Order as accepted by the Seller or in the absence of such Order or acceptance, the written quotation of the Seller. Unless there is any variation as referred to in Clause 4.2, all prices quoted are valid for the period stated in the quotation (and if no period is stated, for up to 30 days only from the date of issuance of the quotation), after which time they may be altered by the Seller without giving notice to the Purchaser.
- 4.2. The quoted prices are based upon the scope of the Supplies referred to in the Seller's written quotation. In the event of any variation in, inter alia, the scope of Supplies ordered including delivery dates from that of the Seller's offer, the Seller reserves the right to vary the prices quoted.
- 4.3. Except as otherwise agreed in writing between the Purchaser and the Seller, all prices are given by the Seller on an ex Works basis, and where the Seller agrees to deliver the Supplies otherwise than at the Seller's premises, the Purchaser shall be liable to pay the Seller's charges for transport, packaging and insurance.
- 4.4. For the provision of Services at the Site, the price shall exclude any incidental costs incurred by the Seller for the purposes and in the course of providing the Services i.e. travel costs, costs for transporting tools and equipment etc.
- 4.5. The price is exclusive of any applicable goods and services tax ("GST") or other government charge or duty, which the Purchaser shall be additionally liable to pay at the rate and in the manner from time to time prescribed by law. If exemption from taxes is claimed, the Purchaser must provide a certificate of exemption or such other notice as required by the relevant law. Any additional costs incurred by the Seller pursuant to any Act of Parliament or any order or regulation made by any governmental body or department shall be paid by the Purchaser. The price shall be net of any withholding tax payable by the Purchaser, and in no event shall the Purchaser be entitled to withhold or deduct any such tax from the price.
- 4.6. The Seller shall be entitled to adjustment of the price (to be mutually agreed in writing) in the event of changes in law or engineering standards applicable to or affecting the Supplies after the execution of this Contract.

5 Terms of payment

- 5.1. After the acceptance of the Order, the Seller reserves the right to suspend performance or withhold delivery under an Order if the Seller in its reasonable opinion determines that the Purchaser's credit worthiness is unsatisfactory or that the Purchaser will not be able to pay the amounts due and payable under the Contract or if the Purchaser fails to make payment of any amount due and payable ("Suspension"). The Seller shall by written notice to the Purchaser inform the Purchaser of such Suspension.
- 5.2. The Purchaser shall pay the price of the Supplies within 30 days of the date of the Seller's invoice. The time of payment of the price shall be of the essence of the Contract. Receipts for payment will be issued only upon request.
- 5.3. If the Purchaser fails to make any payment on the due date then, without prejudice to any other right or remedy available to the Seller, the Seller shall be entitled to:
 - 5.3.1. suspend any further deliveries and/or Services to the Purchaser and terminate the same pursuant to Clause 10 (without being liable to the Purchaser for any losses);
 - 5.3.2. at its sole discretion, apply any monies received from the Purchaser in relation to the Contract or any other contract or agreements between the Seller and the Purchaser, including deposits or security payments, towards the payment of the relevant invoice; and

5.3.3. charge the Purchaser interest on the amount unpaid on a daily basis at the rate of one per cent (1%) per annum above the current overdraft rate which the Seller has obtained, or is reasonably able to obtain, with its principal trading bank in New Zealand, from the due date until payment in full is made.

5.4. The Purchaser is not entitled to withhold from, set off against or otherwise reduce any payments due to the Seller unless agreed in writing by the Seller.

6 Delivery & Installation

6.1. Unless otherwise agreed in writing, Supplies shall be delivered to Purchaser's premises (in so far as those Supplies are capable of physical delivery).

6.2. Partial delivery/performance of Supplies ordered is permissible. Where the Supplies are to be delivered/performed in instalments, each delivery/performance shall constitute a separate contract and failure by the Seller to deliver/perform any one or more of the instalments in accordance with these Conditions or any claim by the Purchaser in respect of any one or more instalments shall not entitle the Purchaser to treat the Contract as a whole as repudiated.

6.3. Where in relation to the delivery/provision of Supplies, works need to be performed by the Seller at a Site, the Purchaser shall at its own costs and expense, take all necessary measures, to prepare the Site and ensure that the Site is suitable and ready for the commencement of the works or Services. The Purchaser shall ensure that the access roads to the Site are clear, the Seller's personnel are able to commence work immediately upon their arrival at the Site and further ensure that work proceeds in an uninterrupted manner. The Purchaser is responsible for all things related to the Site and shall supply the Seller with such labour, information, facilities, equipment and any other materials and tools which the Seller requires for the delivery/provision of the Supplies, information relating to the Site and all auxiliary services required by the Seller which are relevant for the purposes of the delivery/provision of the Supplies. The Purchaser must at all times take all reasonably practicable steps to ensure that no act or omission causes a risk, hazard, significant hazard, harm or serious harm to any employee or other representative of the Seller or any person lawfully at any Site. To the extent permitted by law, the Purchaser will indemnify and keep indemnified the Seller from all costs, damages, loss and expense incurred or suffered by the Seller in respect of any breach of the New Zealand Health and Safety at Work Act 2015 in respect of the Seller's delivery and/or installation of Supplies at the Site.

6.4. Where the Purchaser does not either provide or fulfil the above required obligations in Clause 6.3 to the satisfaction of the Seller, the Seller shall be entitled to carry out all necessary work at the costs and expenses of the Purchaser provided the Purchaser has been informed of the non-compliance and has failed to remedy this within the rectification period set out in such notice of non-compliance. The Purchaser shall not move any Goods, equipment or part thereof from the Site without the prior consent in writing of the Seller.

6.5. Subject to the Purchaser granting the Seller such reasonable access to the Site and the Site conditions being suitable for the performance of the works or Services in accordance with Clause 6.3, the Seller shall commence work at the Site on the scheduled date and/or deliver the Supplies on the scheduled date.

6.6. Where Supplies are supplied to the Purchaser and no assembly, installation, erection and commissioning is required:

6.6.1. The Purchaser is obliged to inspect the Supplies upon delivery and shall notify the Seller within one (1) week of receipt of the Supplies if there are any defects. Such notification of any defects shall be accompanied with relevant supporting evidence.

6.6.2. If the Purchaser fails to notify the Seller of the defects within one (1) week of the receipt of the Supplies, it will be deemed to have accepted such part of the Supplies.

6.7. Where installation, erection or commissioning is required:

6.7.1. The Purchaser shall accept the Supplies within two (2) weeks from the date that the Seller declares that the Supplies are ready for acceptance.

6.7.2. The Purchaser will be deemed to have accepted the Supplies if (a) the Supplies are put to use by the Purchaser for commercial purposes or for other purposes other than for testing; (b) it fails to respond to the Seller's declaration for acceptance; or (c) it fails to accept the Supplies within the two (2) weeks period without providing any written reasons or specific details of such refusal.

- 6.8. The Purchaser shall not be entitled to withhold acceptance for (a) defects which do not materially affect the usage of the Supplies; (b) minor deviations deficiencies which do not materially affect the functioning of the Supplies; (c) defective installation or erection not carried out by the Seller; or (d) reasons which are not within the reasonable control of the Seller.
- 6.9. Any costs and expenses related to the inspection and/or acceptance of the Supplies shall be borne by the Purchaser.
- 6.10. Subject to clause 8.3.5, if the Seller fails to Deliver the Supplies by the Delivery Date (and in the case where Delivery is via instalment, by the last Delivery Date), and such failure is due to the sole fault of the Seller, the Seller is liable to pay to the Purchaser liquidated damages up to 0.5% of the portion of price [per day] (excluding any charge for transport, packaging or insurance) corresponding to that part of the Supplies which because of the delay could not be put to intended use for each consecutive seven-day period (inclusive of the seventh day) of delay, up to a maximum aggregate of 5% of such price. Such payment of liquidated damages shall be the Purchaser's sole and exclusive remedy for delay or failure to deliver and shall be in lieu of any other rights the Purchaser may have against the Seller under the law.
- 6.11. The Delivery Date(s) may be extended, at the Seller's discretion and by written notification to the Purchaser, by such further periods as may reasonably reflect any delay which will or may be or has been caused by any of the following events:
 - 6.11.1. Force Majeure, as provided in Clause 14;
 - 6.11.2. Any variation or suspension of the Contract pursuant to Clauses 2.3 or 3.4;
 - 6.11.3. Any suspension of the Contract pursuant to Clause 10;
 - 6.11.4. Any breach of Contract by the Purchaser;
 - 6.11.5. If the Supplies are not Delivered due to or in relation to the event described in Clause 6.13; or
 - 6.11.6. Any other circumstances where the Seller is entitled under law to have an extension of time.
- 6.12. The Seller shall not be liable for any delays due to an act or omission of the Purchaser (including any failure of the Purchaser to comply with any of its obligations under the Contract ("Purchaser's Default")). Where there is a Purchaser's Default, the Seller shall be entitled to claim such increase in costs incurred by the Seller as a result of the Purchaser's Default.
- 6.13. If the Purchaser fails to give the Seller adequate delivery instructions at the time stated for delivery then, without prejudice to any other right or remedy available to the Seller, the Seller may:
 - 6.13.1. store the Supplies until actual delivery and charge the Purchaser for the reasonable costs (including insurance) of storage; or
 - 6.13.2. sell the Supplies at the best price readily obtainable and (after deducting all reasonable storage and selling expenses) charge the Purchaser for any shortfall below the price under the Contract.
- 6.14. The Seller will give a credit note only for any Supplies or any part thereof that has been wrongly delivered/performed or over supplied.
- 6.15. Charges for all handling and transport as determined by the Seller are to be paid by the Purchaser except where such Supplies have been wrongly delivered or over supplied or where such charges have been incurred as a result of the Seller's performance of obligations during the warranty period under Clause 8.

7 Title and Risk

- 7.1. Unless otherwise agreed in writing between the Parties, risk of damage to or loss of the Supplies shall pass to the Purchaser as soon as they are Delivered.

- 7.2. Notwithstanding delivery and the passing of risk in the Supplies, or any other provision of these Conditions, title in the Supplies shall not pass to the Purchaser until the Seller has received in cash or cleared funds payment in full of the price of the Supplies and all other goods agreed to be sold by the Seller to the Purchaser for which payment is then due.
- 7.3. Until such time as title in the Supplies passes to the Purchaser, the Seller shall be entitled at any time to require the Purchaser to deliver up the Supplies to the Seller and, if the Purchaser fails to do so forthwith, to enter upon any premises of the Purchaser or any third party (whose cooperation the Purchaser hereby undertakes to procure) where the Supplies are stored and repossess the Supplies. Until such time as in accordance with this provision, the Supplies shall not be pledged or given as security or resold by the Purchaser and the Purchaser undertakes to store the Supplies in its premises separately from its own goods or those of any other person and in a manner which makes them readily identifiable as the Seller's Goods.
- 7.4. The Purchaser shall reimburse the Seller for any expenses and costs to the Seller in recovering any Supplies arising from any non-compliance by the Purchaser with the terms of clause 7.3.

8 Warranties

- 8.1. The Seller warrants that it will perform the Services where required with reasonable care and skill and that the Supplies will correspond with their specification at the time of delivery and will be free from defects in material and workmanship under normal use and service for a period of twelve (12) months ("Warranty Period") from the date of Delivery of the Supplies.
- 8.2. If the Supplies are repaired or replaced during the Warranty Period, the period of Warranty for replacements shall run for six (6) months from the date of such repair or replacement but shall run at least until the expiry of the original warranty period as provided under clause 8.1 and shall end at latest six (6) months after the end of the Warranty Period ("Extended Warranty Period").
- 8.3. Notwithstanding clauses 8.1 and/or 8.2, the Seller shall be under no liability under Clause 8.1 and 8.2 whatsoever:-
 - 8.3.1. in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Seller's instructions (whether oral or in writing), misuse or alteration or repair of the Supplies without the Seller's approval or improper or inadequate maintenance by the Purchaser;
 - 8.3.2. in respect of minor deviations from the drawings, design or specifications supplied by the Seller, insignificant deviations from the agreed quality or minor impairment of usability which do not materially affect the commercial use of the Supplies;
 - 8.3.3. if the Supplies have been used in a manner or under a circumstance or for a purpose not reasonably to be inferred by the Seller or disclosed to the Seller prior to making the Contract;
 - 8.3.4. if the total price for the Supplies has not been paid by the due date for payment;
 - 8.3.5. for any delay in the Delivery or installation of the Supplies if such delay arises or results from variation of the Contract pursuant to Clause 2.3;
 - 8.3.6. if the Purchaser permits persons other than the authorised representative of the Seller to effect any replacement of parts, maintenance adjustments or repairs to the Supplies;
 - 8.3.7. Where the Supplies are Software, for non-reproducible software errors.
- 8.4. Save for the warranties specified in Clause 8.1, all other warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law. The Seller specifically disclaims the implied warranties of merchantability and fitness for a particular purpose.
- 8.5. For the purposes of section 5D of the New Zealand Fair Trading Act 1986 ("FTA") and section 43 of the New Zealand Consumer Guarantees Act 1993 ("CGA") the parties acknowledge and agree that, to the extent permitted by law:
 - 8.5.1. the Supplies provided to the Purchaser by the Seller under or in connection with the Contract are being provided and acquired in trade;

- 8.5.2. to the extent that the FTA and/or the CGA applies to the sale of the Supplies to the Purchaser under the Contract, in respect of all matters under or in connection with the Contract, the parties are contracting out of the CGA and sections 9, 12A, 13 and 14(1) of the FTA;
- 8.5.3. the parties have each had an opportunity to receive advice from a lawyer prior to entering into the Contract; and
- 8.5.4. it is fair and reasonable for the parties to be bound by this clause 8.5.
- 8.6. During the Warranty Period and Extended Warranty Period (as the case may be), any claim by the Purchaser which is based on any defect in the quality or condition of the Supplies or their failure to correspond with specification shall (whether or not delivery is refused by the Purchaser) be notified to the Seller within the relevant period referred to in Clause 6.6 and 6.7 or (where the defect or failure was not apparent on reasonable inspection) within 7 days after discovery of the alleged defect or failure, failing which the Seller shall not be liable under the warranty provided in Clause 8.1 herein.
- 8.7. Where any valid claim in respect of any of the Supplies which is based on any defect in the quality or condition of the Supplies or their failure to meet specification is notified to the Seller in accordance with these Conditions, the Seller's sole liability shall be to repair the Supplies or replace the Supplies (or the part in question) free of charge at the Seller's sole discretion, or refund to the Purchaser the price of the defective Supplies (or a proportionate part of the price).
- 8.8. The benefit of this Warranty shall apply only to the Purchaser.
- 8.9. Clause 8 sets out the Purchaser's sole and exclusive remedy for all warranty claims during the Warranty Period and Extended Warranty Period.

9 Intellectual Property Rights

- 9.1. If any claim, demand, action or proceeding is brought against the Purchaser for alleged infringement of any registered design or trade mark or trade name or copyright or letters patent (the specifications of which are published prior to the date of the Order) by the Supplies or any part thereof or any allegation of such infringement is made, and provided that the Purchaser does not concede the existence of an infringement but gives the Seller immediate notice in writing of any such allegations or infringement or of the institution of any such action or proceeding and permits the Seller to answer the allegation and to conduct all negotiations in respect of such allegation and to defend the action or proceeding, and also provided that the Purchaser gives the Seller (at the Seller's costs and expense) all information assistance and authority required for those purposes and does not by any act (including any admission or acknowledgment) or omission prejudice the conduct of such defence, then:
 - 9.1.1. The Seller will at its own election either effect any settlement or compromise which it deems reasonable or at its own costs and expense defend any such action or proceeding and if the Supplies or any part thereof is in such action or proceeding held to constitute infringement and is the subject of an injunction restraining its use or any order providing for its delivery up or destruction the Seller shall at its own election and costs and expense either:
 - 9.1.1.1. procure the Purchaser the right to retain and continue to use the Supplies or part thereof; or
 - 9.1.1.2. modify the Supplies or any part thereof so that it becomes non-infringing; or
 - 9.1.1.3. replace the Supplies or any part thereof with one that is non-infringing.
- 9.2. The Seller shall not be under any of the obligations specified in clause 9.1 hereof in any of the following events:
 - 9.2.1. Any infringement or allegation thereof which is due to the Seller having followed a design or instruction furnished by the Purchaser or based upon the use of the Supplies in a manner or for a purpose not reasonably to be inferred by the Seller or disclosed to the Seller prior to making the Contract or in combination with other goods or devices or services not made or supplied by the Seller; or
 - 9.2.2. The Purchaser entering into any compromise or settlement in respect of such action or proceeding without the Seller's prior consent in writing; or
 - 9.2.3. Modifications of the Supplies by the Purchaser or a third party.

- 9.3. If the Purchaser stops using the Supplies in order to reduce the damage or for any other good reason, it shall be obliged to point out to the third party that no acknowledgement of the alleged infringement may be inferred from the fact that the use has been discontinued.
- 9.4. The Seller's obligation to reimburse the Purchaser for any claims resulting from the infringement of any intellectual property rights shall expire three (3) years from the start of the Warranty Period.
- 9.5. Save as provided in Clause 9, the Seller shall not be liable for any damage or losses incurred by the Purchaser arising from the use or non-use of any infringing Supplies or any part thereof.
- 9.6. If the Supplies are to be manufactured or any process is to be applied to the Supplies by the Seller in accordance with a specification submitted by the Purchaser, the Purchaser warrants that any design or instructions furnished or given by it shall not be such as will cause the Seller to infringe any registered designs or trade mark or trade name or copyright or letters patent in the performance of the Contract and shall indemnify the Seller against all loss, damages, costs and expenses awarded against or incurred by the Seller in connection with or paid or agreed to be paid by the Seller in settlement of any claim for infringement of any patent, copyright, design, trade mark or other industrial or intellectual property rights of any other person which results from the Seller's use of the Purchaser's specification.
- 9.7. The patent and design rights held by the Seller shall remain the absolute property of the Seller and such designs and drawings, equipment or any part thereof shall not be reproduced or disclosed or allowed to be reproduced or disclosed by the Purchaser without the Seller's consent in writing.

10 Termination and/or Suspension of Supplies

- 10.1. In the event that:
 - 10.1.1. the Purchaser is in breach of the Contract; or
 - 10.1.2. the Purchaser makes any voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) goes into liquidation (otherwise than for the purposes of amalgamation or solvent reconstruction) or have an order made or resolution passed for such winding-up or shall otherwise become insolvent or make such proposal, assignment or arrangement for the benefit of its creditors or have a receiver or statutory manager appointed over its affairs or have an application made to court for the appointment of a statutory manager or be placed under a statutory management order; or
 - 10.1.3. an encumbrancer takes possession of, or a receiver is appointed over, any of the property or assets of the Purchaser; or
 - 10.1.4. the Purchaser ceases, or threatens to cease, to carry on business; or
 - 10.1.5. there is a change in control of the Purchaser which in the reasonable opinion of the Seller adversely affects the position, rights or interests of the Purchaser. (For the purpose of this sub-clause, "control" means the ability to direct the affairs of another whether by virtue of contract, ownership of shares, or otherwise howsoever); or
 - 10.1.6. in the reasonable opinion of the Seller, there occurs a material change in the financial position of the Purchaser which is likely to affect the Purchaser's ability to perform its obligations under the Contract; or
 - 10.1.7. The Seller reasonably apprehends that any of the events mentioned above is about to occur in relation to the Purchaser and notifies the Purchaser accordingly, the Seller shall be entitled to, by issuance of a written notification, (i) terminate the Contract forthwith on the occurrence of each of the events in Clauses 10.1.2, 10.1.3, 10.1.4 or 10.1.5 or suspend any further deliveries, production or commissioning works or the Services under the Contract without any liability to the Purchaser on the occurrence of each of the events in Clauses 10.1.1, 10.1.6 and 10.1.7, and upon the issuance of Seller's written notification of such termination or suspension, (ii) if the Supplies have been delivered or completed but not paid for, the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary, and (iii) the Seller shall be entitled to retain any security given or monies paid by the Purchaser and apply the said security or monies against the assessed losses and damages, if any, suffered by the Seller, or if there is no such security or monies paid by the Purchaser, to recover the same otherwise.

- 10.2. Upon the issuance by the Seller of a written notification giving notice of the suspension of any further deliveries, production or commissioning works or the Services under the Contract pursuant to Clause 10.1, the Purchaser shall:
- 10.2.1. if the suspension is due to or arises from a breach by the Purchaser of the Contract under Clause 10.1.1, remedy such breach within fourteen (14) days of the written notification of suspension, failing which the Purchaser shall be entitled to terminate the Contract forthwith by issuance of a written notice to the Purchaser; or
 - 10.2.2. if the suspension is due to or arises from a material change in the Purchaser's financial position in accordance with Clause 10.1.6, provide the Seller with a bank guarantee or such other security ("Security") to the Seller's reasonable satisfaction within thirty (30) days of the written notification of suspension, failing which the Seller shall be entitled to continue the suspension until the Seller is provided with such Security or to terminate the Contract forthwith by issuance of a written notice to the Purchaser; or
 - 10.2.3. if the suspension is due to or arises from a Clause 10.1.7 event, provide the Seller with proof to the Seller's reasonable satisfaction, within thirty (30) days of the written notification of suspension, that the relevant event, the occurrence of which the Seller reasonably apprehends, is not occurring and will not occur, failing which the Seller shall be entitled to continue the suspension until the Seller is provided with such proof or to terminate the Contract forthwith by issuance of a written notice to the Purchaser.
 - 10.2.4. In the event the Contract is terminated pursuant to Clauses 10.2.1 to 10.2.3, the Seller shall, in addition and without prejudice to the remedies in Clause 10.1, be entitled to recover all losses and damages from the Purchaser.
- 10.3. The losses and damages in Clauses 10.1 and 10.2 shall include but are not limited to all costs, expenses and liabilities reasonably incurred by the Seller in respect of Goods that are partially completed or Services not fully performed as well as any costs, expenses and liabilities in expectation of the completion of the Supplies. Termination of the Contract by the Seller shall not discharge the Purchaser from any existing obligation accrued due on or prior to the date of termination.
- 10.4. The rights and remedies granted to the Seller pursuant to the Contract are in addition to, and shall not limit or affect, any other rights or remedies available at law or in equity.

11 Software

- 11.1. Where applicable, the Seller grants to the Purchaser a non-exclusive, non-transferable license to use the Software delivered with the Supplies for the purposes stated in the manual of the Supplies during the validity of the Contract subject to the provisions of this clause 11.
- 11.2. The Purchaser acknowledges that the Software contains valuable confidential and proprietary information and trade secrets of the Seller or its licensors, and undertakes that it (including its Related Companies, agents, employees and/or servants) shall not, without the Seller's prior consent in writing, disclose the details of the Software to third parties.
- 11.3. All rights, title and interest in the Software, including revisions and updated versions, shall remain the property of the Seller or its licensors. All rights to the Software not expressly granted in the Contract shall remain reserved.
- 11.4. In the event the Software contains third party components which the Seller has licensed under generally used "open source" license terms, the terms of the Contract shall apply to those components to the extent that they do not conflict with the "open source" license terms. If necessary, the Purchaser agrees to sign a license agreement with the licensor of the Software.
- 11.5. The Purchaser is not allowed to make any back-up copies of the Software without the Seller's prior consent in writing.
- 11.6. The use of the Software on hardware other than the agreed equipment requires the Seller's consent in writing.
- 11.7. Unless otherwise agreed, the Software shall be provided in machine-readable form (object code) only.
- 11.8. The Seller may terminate the Purchaser's license upon notice of breach of these license terms. The Purchaser must destroy all copies of the Software immediately upon notice of termination. The Purchaser will not disassemble or otherwise modify the Software without express agreement in writing from the Seller.

- 11.9. The Purchaser will notify the Seller in writing immediately if it has knowledge of the existence of any circumstances which may suggest that any person may have unauthorised knowledge, possession or use of the Software or other intellectual property rights.
- 11.10. The Purchaser will take any steps reasonably requested by the Seller or the Seller's Related Companies from time to time, at the Seller's or its Related Companies' expense, to give effect to, and protect, the Seller's and/or its Related Companies' intellectual property rights (including intellectual property rights in relation to the Software).

12 Limitation of Liability

- 12.1. Notwithstanding anything to the contrary in the Contract and except to the extent required by law, the total liability of the Seller, the Seller's personnel, the Seller's Related Companies as well as the Seller's sub-contractors for any act or omission, whether in contract, tort (including negligence or strict liability), by way of indemnities or any other legal or equitable theory shall not exceed:
 - 12.1.1. (in the case of Supplies where the contract price is calculated on an annual basis) 5% of the contract price of the Supplies for the preceding 12 calendar months' (calculated from the date of the breach);
 - 12.1.2. (in all other instances) 10% of the price of the Supplies under the Contract.
- 12.2. Notwithstanding anything else in the Contract, the Seller shall not be liable to the Purchaser for any reason including for any loss of profit (actual or anticipated), loss of use, loss of production, loss of contracts, loss of opportunities, loss of revenue, cost of capital, costs of replacement, loss of goodwill, loss of reputation, loss or degradation of information or data, loss from any third party contracts, loss due to business interruption, loss of interest, loss of power, cost of purchased or replacement power, contractual claims from third parties or any indirect, incidental, special or consequential losses or damages arising from or in connection with its performance or non-performance under this Contract and whether based upon contract, tort, or any other legal theory. Clause 12.2 shall apply to the benefit of the Seller's personnel, the Seller's Related Companies and the Seller's sub-contractors.

13 Force Majeure

- 13.1. The Seller shall not be liable to the Purchaser or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of the Seller's obligations in relation to the Supplies, if the delay or failure was due to force majeure. For the purposes of this clause, force majeure shall mean any unforeseen event beyond the reasonable control of the Seller such as, but not limited to any act of God, act of government or any authorities, non-issuance of licences, hostilities between nations, war, riot, civil commotions, civil war, insurrection, blockades, import or export regulations or embargoes, rainstorms, national emergency, earthquake, fires, explosion, flooding, hurricane or other exceptional weather conditions or natural disaster, acts of terrorism, accidents, sabotages, strikes, shortages in material or supply, infectious diseases, epidemics, as well as travel restrictions or travel warnings due to any such events. If any delay in performing, or any failure to perform the Contract is caused by the delay of a subcontractor of the Seller, and is beyond the control and without the fault or negligence of the Seller, the Seller shall incur no liability for such delay.
- 13.2. Where there is force majeure, the Seller is entitled to an extension of the Delivery Date(s) as provided in Clause 6.
- 13.3. Without prejudice to the other provisions of this Contract, where the force majeure continues for more than six (6) months, the Seller shall have the right to terminate the Contract. In such a situation, the Seller shall be reimbursed for Supplies already performed/delivered, cost of materials or goods reasonably ordered, any other expenditure reasonably incurred in the expectation of completing the Supplies as well as the reasonable cost for removal of the Seller's equipment and demobilization of personnel.

14 General

- 14.1. The Purchaser shall not assign any of its rights or obligations under the Contract without the prior written consent of the Seller, such consent to be signed by its authorised representatives. Any attempted delegation or assignment shall be void. The Seller may attach conditions to the giving of its consent.
- 14.2. The Seller may assign any of its rights (including receivables) under the Contract without the prior written consent of the Purchaser.

- 14.3. The Seller may sub-contract the performance of the Contract or any part of the Contract without obtaining the prior consent of the Purchaser.
- 14.4. Any international shipment terms quoted in relation to the delivery of the Supplies shall be in accordance to Incoterms 2010 or its latest version as from time to time modified supplemented or revised.
- 14.5. The Purchaser shall comply with all relevant statutes, rules and regulations and by-laws affecting its obligations and the performance of the Contract and shall obtain at its own costs and expenses all necessary permits and licences and shall furnish to the Seller, upon request, information or documentation of the Purchaser's compliance, as well as to any other information or documentation required to enable the Seller to comply with any laws, rules, regulations and requirements applicable to its performance of the Contract.
- 14.6. Any notice required or permitted to be given by either Party to the other under these Conditions shall be in writing and signed by the authorised representatives of the Party addressed to that other Party at its registered office or principal place of business or such other address as may at the relevant time have been notified to the Party giving the notice. Notices may be delivered by hand, or by prepaid registered post or by facsimile and shall be deemed to have been served:
 - 14.6.1. if by hand, at time of delivery;
 - 14.6.2. if by prepaid registered post, 3 working days after posting;
 - 14.6.3. if by facsimile, on the date printed on the facsimile transmission report produced by the sender's machine.
- 14.7. No waiver by the Seller of any breach of the Contract by the Purchaser shall be considered as a waiver of any subsequent breach of the same or any other provision. If the Seller delays, targets or chooses not to enforce its right under the Contract, it shall not affect its right to do so at a later date.
- 14.8. If any provision of these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part such provision shall be construed, limited or if necessary, severed to the extent necessary to eliminate such invalidity or unenforceability and the validity of the other provisions of these Conditions and the remainder of the provision in question shall not be affected but shall remain in full force and effect.
- 14.9. No terms shall survive the expiry or termination of the Contract unless expressly provided.
- 14.10. The Contract may be enforced against the Purchaser by a Related Company of the Seller for the purposes of the New Zealand Contracts (Privity) Act 1982.
- 14.11. The Contract is the entire agreement between the Parties concerning its subject matter and may not be changed unless agreed in writing by properly authorised representatives of both Parties. The Contract shall supersede any other express or implied, written or oral terms, arrangements, customs or practices.
- 14.12. The relationship of the Seller and the Purchaser is that of an independent supplier to its customer. Except as expressly provided in the Contract, nothing in the Contract is intended to constitute a relationship of employment, trust, agency, joint venture, partnership or any other fiduciary relationship between the Parties. No Party has authority to bind or incur debts on behalf of the other party unless expressly provided for in the Contract.
- 14.13. Each Party agrees to keep the terms of the Contract and any information acquired by them pursuant to the Contract confidential, except:
 - 14.13.1. as is agreed in writing between the Seller and the Purchaser and, in such case, strictly limited to the terms agreed and any conditions attached to such agreement;
 - 14.13.2. to a prospective purchaser of that Party's business for the purposes of the prospective purchaser undertaking due diligence in respect of that Party's business, provided that the prospective purchaser enters into an appropriate confidentiality agreement with that Party (such agreement committing the potential purchaser to keep any information it obtains in relation to the Contract confidential);
 - 14.13.3. to its Related Companies, directors, officers, employees, agents, advisers, contractors or representatives to the extent necessary to obtain the benefit of, or to properly perform their obligations, under the Contract; or

14.13.4. as required by an applicable law or the rules of a recognised stock exchange, after first consulting with the other Party to the extent practicable about the form and content of the disclosure.

15 Applicable Law and Dispute Resolution

- 15.1. The Contract (including these Conditions) shall be governed by and construed in accordance with the laws of New Zealand. The application of the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 shall be excluded.
- 15.2. The Parties will use their best efforts to negotiate in good faith and settle any dispute that may arise out of or relate to this Contract or any breach of it. If any such dispute cannot be settled amicably through ordinary negotiations between representatives of the Parties, the dispute shall be referred to the management of each Party who will meet in good faith in order to try and resolve the dispute.
- 15.3. All negotiations connected with the dispute will be conducted in complete confidence and the Parties undertake not to divulge details of such negotiations except to their professional advisers who will also be subject to such confidentiality and such negotiations shall be without prejudice to the rights of the Parties in any future proceedings.
- 15.4. In the event any such dispute is unresolved after thirty (30) days after one Party has given notice to the other of its intention to commence such negotiations referred to in Clause 15.2, such disputes arising out of or in connection with the Contract, including any question regarding its existence, validity or termination, shall be finally settled under the New Zealand Dispute Resolution Centre (“NZDRC”) Rules for Expedited Commercial Arbitration ECA60, which rules are deemed to be incorporated by reference into this clause. The arbitration will be by a sole arbitrator to be appointed by the NZDRC. The arbitration shall take place in Auckland, New Zealand. The language to be used in the arbitration proceedings shall be English. The award in the arbitration will be final and binding on the parties, subject only to Articles 33 and 34 of the First Schedule and the right to appeal on questions of law under clauses 5(1)(b) and (c) of the Second Schedule to the New Zealand Arbitration Act 1996.
- 15.5. Nothing in this clause 15 will preclude either Party from taking immediate steps to seek urgent equitable relief before a New Zealand Court.