

# Terms & Conditions (New Goods) – Worldwide

## 1. Definitions

- 1.1 Unless the context otherwise requires the following definitions shall apply to these Terms and Conditions.

**Buyer** means the entity to whom the Goods and/or Services are supplied.

**Contract** means the contract between the Seller and the Buyer for the provision of Goods and/or Services by the Seller of which these Terms and Conditions and the Quote form part.

**Goods** means the goods supplied by the Seller to the Buyer.

**Price** means:

- (a) where a Quote has been given, the price for the Work recorded in that Quote; and
- (b) otherwise, the Seller's usual charges for completing the Work,

plus any additional charges pursuant to these Terms and Conditions.

**ICC** means International Chamber of Commerce.

**Property** means the property, premises, site or location where the Goods are to be commissioned or installed and/or the Services are provided by the Seller.

**Quote** means any quotation or estimate provided by the Seller to the Buyer, and includes an invoice or sales order confirmation, as applicable.

**Seller** means the Wyma entity specified in the Contract as supplying Goods and/or Services to the Buyer.

**Services** means the services supplied by the Seller to the Buyer in terms of the Contract.

**Terms and Conditions** means these terms and conditions.

**Work** includes all Goods and/or Services supplied or required to be supplied by the Seller in the course of, or performance of, the Contract.

## 2. Acceptance of the Terms and Conditions

- 2.1 Engaging the Seller to carry out Work or acceptance of a Quote provided by the Seller constitutes acceptance by the Buyer of the terms and conditions set out in the Contract.
- 2.2 Questions relating to the Contract that are not settled by the provisions in the Contract itself shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention of 1980) (**CISG**)
- 2.3 Any reference made to an ICC publication (ie, Incoterms) is a reference to the version current as at the date of the Contract.

## 3. Quotes, price and variations

- 3.1 Unless otherwise stated, any Quote is open for acceptance for 30 days from the date of the Quote but is subject to the Seller's acceptance of the Buyer's order in writing, which forms the Contract between the Seller and the Buyer.
- 3.2 Any requested variation to the Work must be notified in writing by the Buyer. If the Seller agrees, the Price

will be adjusted accordingly or alternatively, in the Seller's sole discretion the variation will be charged at the Seller's then prevailing rate.

- 3.3 Unless otherwise stated in the Quote, a Price is given in New Zealand dollars.

- 3.4 The Price does not include any taxes, levies, customs duties and other amounts (such as goods and services tax) imposed or chargeable by any governmental authority on the importation of the Goods or the performance of the Services, and all such amounts (other than tax on the overall net income of the Seller) shall be payable by the Buyer. If the Seller bears any such amounts or any other costs which, according to the Contract, are for the Buyer's account, the Buyer shall reimburse the Seller on demand and the Price shall be increased accordingly.

- 3.5 Unless otherwise stated in the Quote, the Price does not include any Work to commission or install the Goods on the Property, and this shall be charged in addition to the Price.

- 3.6 If any Work is required to be performed outside normal working hours, the additional cost of doing so and other reasonable expenses associated therewith shall be charged to the Buyer by the Seller.

- 3.7 Seller shall be entitled to an equitable adjustment of the Contract Price and/or an adequate extension of time as required if:

- (a) the price of any raw material, labour or any other costs increase, which is beyond Sellers control;
- (b) due to changes or delays caused by the Buyer; and/or.
- (c) Seller deems it necessary to vary any aspect of the Goods and/or Services due to a change in any applicable law, local regulation or standard becoming effective or taking place after the Effective Date of the Contract including, for the avoidance of doubt, tariff and duty increases.

Seller shall inform the Buyer in writing defining the changes deemed necessary in order to complete the Goods and/or Services in accordance with the Contract and any applicable law, local regulation or standard.

## 4. Cancellation

- 4.1. No cancellation of any order or part of it shall be effective unless accepted by the Seller in writing.
- 4.2. In the event cancellation is accepted by the Seller the Buyer shall promptly pay the Seller for:
  - (a) any charges resulting from design, procurement of materials, Work carried out or Services rendered;
  - (b) any other cost directly or indirectly incurred by the Seller including but not limited to the cost of labour, materials or production capacity unable to be reallocated; and
  - (c) any loss of profits or damage suffered by the Seller as a consequence of the cancellation.

## 5. Payment conditions

- 5.1. Unless otherwise provided in the Contract, the Buyer must pay the Price as follows:
- (a) A deposit of 35% of the Price must be paid within 14 days of acceptance of the Quote.
  - (b) The balance of the Price is payable on the Seller confirming to the Buyer that the Goods are available to depart the Seller's premises.

## 6. Failure of the Buyer to pay the price at the agreed time

- 6.1. If the Buyer fails to pay the Price at the agreed time, the Seller is entitled to charge the Buyer interest on the overdue amount at the rate of 2.5% per month (or, if a maximum rate of interest is prescribed by law, that maximum rate), payable on a daily basis from the due date of payment (and provided that the charging of such interest shall not be deemed to extend the due date for payment). The Seller's entitlement to interest does not limit any other rights it may have, applies without the need to give notice to the Buyer in respect of such interest, and applies before and after any judgement for the outstanding amount.
- 6.2. If the Buyer fails to pay any part of the Price at the agreed time, and does not remedy that failure within an additional period of 14 days after receiving notice by the Seller requiring the remedy, the Seller may declare the Contract avoided in accordance with Article 17.2.

## 7. Delivery

- 7.1. Delivery shall be completed in accordance the ICC Incoterms 2010 delivery rule as required by the Seller, or selected by the Buyer, in the Contract.
- 7.2. The date or period of delivery shall be as set out in the Contract along with any additional delivery terms.
- 7.3. At the Seller's discretion, delivery may be effected in one or more shipments.

## 8. Failure of the Seller to deliver the Goods at the agreed time

- 8.1. If the Seller fails to deliver the Goods and/or Services at the agreed time, and does not remedy that failure within an additional period of 120 days after receiving notice by the Seller requiring the remedy, the Buyer may declare the Contract avoided in accordance with Article 17.2.

## 9. Damages for delay

- 9.1. If the Seller fails to deliver the Goods at the agreed time, the Buyer is entitled to claim liquidated damages for such delay at 0.05% of the Price for each complete day of delay as from the agreed date of delivery or the last day of the agreed delivery period, up to a maximum of 10 days.
- 9.2. In order to claim liquidated damages for delay, the Buyer must notify the Seller of the delay within 10 days of the agreed date of delivery or the last day of the agreed delivery period.

## 10. Lack of conformity

- 10.1. The Goods do not conform to the Contract unless they contain the characteristics set out in Article 35 of the CISG.
- 10.2. In addition to the limitation in Article 35(3) of the CISG, the Seller is not liable for any lack of conformity due to the Goods not being fit for purpose if the Seller has manufactured the Goods according to plans, designs or samples provided by the Buyer.
- 10.3. The Buyer shall examine the Goods, or cause them to be examined, within as short period as is practicable in the circumstances. The Buyer shall notify the Seller of any non-conformity of the Goods, specifying the nature of the non-conformity, within 5 days after the Buyer has discovered or ought to have discovered the non-conformity. In any event, the Buyer loses the right to rely on a lack of conformity if it fails to notify the Seller thereof at the latest within a period of 30 days after the date of delivery.
- 10.4. Where the Buyer has given due notice of non-conformity to the Seller, the Seller will at its option:
- (d) deliver any missing quantity of the Goods;
  - (e) replace the Goods with conforming goods;
  - (f) repair the Goods;
  - (g) reduce the Price in the same proportion as the value that the Goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.
- 10.5. The Buyer may not reduce the Price if the Seller replaces the Goods with conforming goods or repairs the Goods in accordance with paragraphs (a) to (c) of Article 10.4 or if the Buyer refuses to accept such performance by the Seller.
- 10.6. If the Seller provides the Buyer performance data relating to the Goods, that performance data is an estimate only, and the Seller shall not be under any liability to the Buyer for any failure by the Goods to meet such performance criteria.
- 10.7. Any testing required by the Buyer before delivery of the Goods must be specified in the order for the Goods, and accepted by the Seller. If the Seller agrees to undertake such testing, all such testing shall be charged to the Buyer at the Seller's then prevailing rates.

## 11. Buyer's design

- 11.1. Goods manufactured to the Buyer's design are the responsibility of the Buyer. Where the Seller has manufactured goods according to plans, designs or samples submitted by the Buyer, the Buyer indemnifies the Seller against any claim for damages or otherwise based on infringement of intellectual property of a third party and all costs and expenses occasioned by such claims (including solicitor/own client costs).
- 11.2. If the Buyer is to specify the form, measurement of other features of the Goods and it fails to make such specification either on the agreed date or within a reasonable time after receipt of a request from the Seller, the Seller may, without prejudice to any other rights it may have, make the specification itself in accordance with the requirements of the Buyer that

may be known to it. If the Seller makes the specification itself, it must inform the Buyer of the details thereof and must fix a reasonable time within which the Buyer may make a different specification. If the Buyer fails to do so within the time so fixed, the specification made by the Seller is binding.

- 11.3. It is the Buyer's responsibility to ensure that the Goods and Services ordered and supplied are fit and suitable for the purposes for which they are required by the Buyer and the Seller is under no liability in respect thereof.

## 12. Confidential information and copyright

- 12.1. Unless the parties agree otherwise in writing, all intellectual property and any design and/or drawing prepared by the Seller and any copyright or patent (whether existing or not) used or arising therefrom is and remains the exclusive property of the Seller.
- 12.2. Except with the Seller's prior written consent or as may be required by law, the Buyer shall not disclose any information associated with the intellectual property and any design and/or drawing prepared by the Seller and any copyright or patent used or arising therefrom (**Information**), except for:
- (a) information which is either already in the public domain, or subsequently comes into the public domain, other than by reason of a breach of the Contract;
  - (b) information which can be established by the Buyer to have been acquired by it from a third party who owes no obligation of confidence to the Seller;
  - (c) information which the Buyer can establish that it has independently acquired or developed without the use of the Information.
- 12.3. The Buyer agrees not to use the Information for any purpose other than to fulfil its respective obligations of the Contract. In the case of any uncertainty, the Buyer agrees to obtain prior clearance from the Seller.
- 12.4. When disclosure of Information to employees, agents or advisors is reasonably necessary, the Buyer shall first ensure that they are bound by equivalent duties of confidentiality and non-use as those set out under this Article 12.
- 12.5. The Buyer shall take all reasonable care to ensure that all Information in its possession is kept secure and shall return, destroy or otherwise deal with as directed all material containing or incorporating information on the direction of the Seller.
- 12.6. The obligations in this Article 12 continue notwithstanding the avoidance of the Contract.

## 13. Warranty

- 13.1. For the purposes of this Article 13, the Warranty Period is the lesser of the following:
- (a) 12 (twelve) months from the date of the Certificate of Installation and Commissioning issued by the Seller; or
  - (b) 2,000 (two thousand) hours of operation of the Goods.

- 13.2. The Seller warrants the Goods and /or Services against faulty materials and/or workmanship for the Warranty Period provided that:

- (a) the Buyer must have strictly complied with the terms of payment;
- (b) the Goods must have been correctly installed, operated, maintained and serviced in accordance with the Seller's instructions,

- 13.3. All claims in respect of the warranty set out in Article 13.1 must be made to the Seller within as short period as is practicable in the circumstances after delivery of the Goods and are subject to acceptance by the Seller.

- 13.4. Where faults arise in the Goods within the warranty period, the Seller will, at its option, repair or replace any Goods or to refund or credit the portion of the Price in respect of claims in accordance with Article 10.4. At the Seller's discretion the Buyer may be required to return the Goods to the Seller's premises in New Zealand set out in the Contract or such other place as is specified by the Seller within the warranty period.

- 13.5. Any Goods supplied or work done in remedying defects shall not extend the liability of the Seller under this Article 13 beyond the Warranty Period. At the expiry of such period, all liability on the part of the Seller ceases.

- 13.6. The warranty does not apply:

- (a) to fair wear and tear and consumable components except where caused by faulty materials and or workmanship;
- (b) if any repair work, spare part or modification is carried out on the Goods by any person unless that repair work, spare part or modification is authorised, supervised and directed by the Seller;
- (c) to any part of the Goods manufactured or Services rendered by a person other than the Seller. The Seller will use its best endeavours to enforce any guarantee or warranty given by the manufacturer of Goods.

- 13.7. To the maximum extent permitted by law, all other warranties, representations or conditions relating to the Goods and/or Services whether implied by law, trade, custom or otherwise are excluded (however these arise and whether these relate to the quality or fitness for purpose of the goods or otherwise), so that the only warranties given by the Seller in respect of the Goods and/or Services are those expressly contained in the Contract.

- 13.8. Without limiting Article 13.7, to the extent the Goods or Services are supplied and acquired "in trade" (within the meaning of the Fair Trading Act 1986 ("FTA")) in New Zealand the parties contract out of the Consumer Guarantees Act 1993 and sections 9, 12A, 13 and 14(1) of the FTA and agree that it is fair and reasonable to do so.

## 14. Liability

- 14.1. The total liability of the Seller (whether in contract, tort or otherwise) for any loss, damage or injury arising directly or indirectly from any defect in or non-compliance of the Goods and/or Services or any

breach by the Seller of its obligations under the Contract will not in any circumstance exceed the price of the Goods and/or Services.

14.2. To the maximum extent permitted by law, the Seller will not be liable for any consequential, indirect or special damage or loss at any time, nor any loss of profits (whether considered direct damages or not), nor is the Seller liable for any damage or loss caused by the Buyer's employees, agents, buyers or other persons whatsoever.

14.3. The Buyer indemnifies the Seller against any claim by the Buyer's employees, agents or other persons in respect of any loss, damage or injury arising from any defect or non-compliance of the Goods or Services.

## 15. Title and risk

15.1. Risk in the Goods passes to the Buyer when the Seller delivers the Goods in accordance with Article 7.

15.2. Title to the Goods does not pass to the Buyer until the Seller has received payment in full of the Price of the Goods. Until title to the Goods passes to the Buyer, the Buyer is a fiduciary for the Seller and has a duty to account to the Seller for the Goods. It shall keep the Goods separate from those of the Buyer and third parties and shall properly store, protect and insure the Goods and shall identify it as the Seller's property. If the Goods are sold, the Buyer receives the proceeds of sale as a trustee for the Seller and shall place the proceeds of sale in a separate bank account for the benefit of the Seller. The Goods shall not be fixtures or any land or property owned by the Buyer or any third party, regardless of the degree and purpose of their annexation, while the Buyer owes any money to the Seller. If the Goods become mixed with or incorporated in any other goods, property or materials in such a way that they cease to exist as separate goods, the original ownership of the new goods created by that mixing will vest immediately on creation in the Seller as co-owner of the new goods with the owner of any other materials which become part of the new goods. The co-ownership will be calculated proportionally to the value of the various component materials.

## 16. Personal Property Securities Act – Australia and New Zealand

16.1. Without limiting Article 15.2 for the purposes of the Personal Property Securities Act 1999 (New Zealand) and the Personal Property Securities Act 2009 (Australia), to secure all of the Buyer's obligations to the Seller at any time, the Buyer grants a security interest to the Seller in all of the Buyer's present and after-acquired property except for those items or kind of the customer's personal property (excepted property) which has not been supplied by the Seller to the Buyer (other than excepted property which is or comprises proceeds of any personal property supplied by the Seller).

16.2. All payments received by the Seller from the Buyer will (regardless of any direction or intention expressed by the Buyer in respect of such payments) be applied in such manner as the Seller considers necessary or desirable to preserve the Seller's rights

as the secured party under a purchase money security interest to the maximum extent.

16.3. The Buyer shall notify the Seller in writing of any change in name of the Buyer at least 15 working days prior to any change.

## 17. Avoidance of contract

17.1. A party may declare the Contract avoided if:

- (a) the other party commits a fundamental breach of the Contract; or
- (b) the other party breaches the Contract and does not remedy that breach within a period specified in the Contract or (if no such period is specified) within a period of reasonable length specified by the aggrieved party.

17.2. There is a fundamental breach of the Contract where:

- (a) the obligation to be performed is of essence under the Contract; or
- (b) the non-performance substantially deprives the aggrieved party of what it is reasonably entitled to expect under the Contract.

17.3. A declaration of avoidance of the Contract is effective only if made by notice to the other party.

## 18. Effect of avoidance

18.1. Avoidance of the Contract releases both parties from their obligation to effect and to receive future performance, subject to any damages that may be due.

18.2. Avoidance of the Contract does not preclude a claim for damages for non-performance.

18.3. Avoidance of the Contract does not affect any provision in the Contract for the settlement of disputes or any other term of the Contract that is to operate even after avoidance.

## 19. Damages

19.1. Where the Contract is not avoided, damages for a breach of the Contract by one party shall consist of a sum equal to the loss suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the Contract, in the light of the facts and matters which then were known or ought to have been known to it, as a possible consequence of the breach of the Contract.

19.2. In case of avoidance of the Contract, where there is a current price for the Goods, damages shall be equal to the difference between the price fixed by the Contract and the current price on the date on which the Contract is avoided. In calculating the amount of damages, the current price shall be that prevailing at the place where delivery of the Goods should have been made. If there is no such current price or if its application is inappropriate, it shall be the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the Goods. If there is no current price for the Goods, damages shall be calculated on the same basis as that provided in Article 19.1.



- 19.3. If the Contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the Buyer has bought goods in replacement or the Seller has resold goods, the party claiming damages shall recover the difference between the Price and the price paid for the goods bought in replacement or that obtained by the resale.
- 19.4. The damages referred to in Articles 19.2 and 19.3 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, excluding any loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the Contract, in the light of the facts and matters which were known or ought to have been known to it, as a possible consequence of the breach of the Contract.
- 19.5. An aggrieved party must take such measures as are reasonable in the circumstances to mitigate the loss resulting from the breach. If it fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.
- 19.6. Damages are to be paid in a lump sum, and are to be assessed in the currency in which the monetary obligation was expressed.
- 19.7. This Article 19 does not limit the other provisions of the Terms and Conditions (including, without limitation, Articles 14 or 20).

## **20. Force majeure – excuse for non-performance**

- 20.1. **Force majeure** means war, emergency, accident, fire, earthquake, flood, storm, industrial strike or other impediment which the affected party proves was beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the Contract or to have avoided or overcome it or its consequences.
- 20.2. A party affected by force majeure shall not be deemed to be in breach of the Contract, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under the Contract to the extent that the delay or non-performance is due to any force majeure of which it has notified the other party in accordance with Article 20.3. The time for performance of that obligation shall be extended accordingly, subject to Article 20.4.
- 20.3. If any force majeure occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under the Contract, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.
- 20.4. If the performance by either party of any of its obligations under the Contract is prevented or delayed by force majeure for a continuous period in excess of three months, the parties shall negotiate in good faith, and use their best endeavours to agree such amendments to the Contract or alternative arrangements as may be reasonable with a view to alleviating its effects, but if they do not agree upon such amendments or arrangements within a further period of 30 days, the other party shall be entitled to terminate the Contract by giving written notice to the party affected by the force majeure.

## **21. Authorisations**

- 21.1. To the extent any authorisations from any government or regulatory authority are required, each party shall use all reasonable efforts on its part to obtain such authorisations and shall notify the other party promptly of any difficulty encountered.

## **22. Entire agreement**

- 22.1. The Seller and the Buyer agree that the Contract expresses the complete agreement between the parties and that neither party has entered into the Contract in reliance upon any representation, warranty or undertaking of the other party that is not expressly set forth in the Contract.

## **23. Effect of invalid or unenforceable provisions**

- 23.1. If any provision of the Contract is held by any court or other competent authority to be invalid or unenforceable in whole or in part, the Contract continues to be valid as to its other provisions, unless it can be concluded from the circumstances that, in the absence of the provision found to be invalid, the parties would not have concluded the Contract. The parties shall use all reasonable efforts to replace all provisions found to be invalid by provisions that are valid under the applicable law and come closest to their original intention.

## **24. Non merger**

- 24.1. The agreements and obligations of the parties and the Contract evidencing them will not merge upon cancellation or termination of the Contract.

## **25. Notices**

- 25.1. Any notice under the Contract shall be in writing (which may include e-mail) and may be served by leaving it or sending it to the address of the other party as specified by the Buyer and the Seller on the Contract, in a manner that ensures receipt of the notice can be proved.

## **26. Applicable law**

- 26.1. The applicable law governing the Contract is New Zealand, being the law of the country where the Seller has its main place of business.

## **27. Dispute Resolution – International**

- 27.1. Any dispute, controversy or claim arising out of or relating to the Contract shall be determined under the rules of UNCITRAL Rules as revised 2010 as follows:
- (a) Number of arbitrators: three;
  - (b) Language of arbitration: English; and
  - (c) Place of arbitration: London, UK.

## **28. Dispute Resolution – Australia and New Zealand**

- 28.1. Notwithstanding Article 27, if the Buyer has its place of business in Australia and New Zealand then this Article 28 instead applies to any such dispute.
- 28.2. Any dispute may be referred to mediation to be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement. Any such mediation must be conducted by a mediator and at a

fee agreed by the parties. Failing agreement by the parties as to appointment of a mediator within five days of reference to mediation as set out above, the mediator will be selected and his/her fee determined by the President for the time being of LEADR New Zealand Inc. (or any suitable replacement organisation),

- 28.3. If the Dispute remains unresolved after mediation or the parties do not elect to refer a Dispute to mediation, then the Parties are free to pursue the legal remedies available to them as they see fit.
- 28.4. Nothing in this Article 28 will prevent any party from taking immediate steps to seek urgent interlocutory relief before an appropriate Court.