

## Select Engineering Ltd - TERMS AND CONDITIONS OF TRADE

By requesting the Company to supply Goods and/or Services to the Customer, the Customer acknowledges and agrees (or is deemed to acknowledge and agree) that:

- (a) the Customer's written assent or agreement to the Company's terms and conditions of trade (the "Terms") forming part of each Contract (as evidenced by the Customer's signature on the Company's credit application form quote or any other document which incorporates these Terms) is and constitutes a security agreement providing for both future advances and a security interest in favour of the Company in all of the Customer's present personal property and after-acquired property, but that these Terms do not apply to property not supplied by the Company; and
- (b) the Terms will apply to each Contract and the supply of Goods and/or Services by the Company to the Customer and, where applicable, the provision of any incidental services under the Contract; and
- (c) the Terms will be or are deemed to be incorporated into, and form part of, each Contract, as if these Terms were set out or implied therein in full;
- (d) each Contract will create or creates, in favour of the Company, a security interest in the Goods which are the subject of the Contract; and
- (e) the security interest granted by the Customer to the Company secures the payment by the Customer to the Company of all amounts the Customer may owe the Company from time to time and at any time.

### 1. INTERPRETATION

#### 1.1 In these Terms:

'Amount Owning' means, at any time in respect of the Contract, the unpaid part of the Price and any other amounts which the Company is entitled to recover under the Contract (including these Terms);

'Company' means Select Engineering Limited;

'Contract' means any contract between the Company and the Customer for the supply of Goods, whether created by electronic mail, order form quotation or by any other means;

'Contract Date' means

- (a) for a Contract arising from an order placed by the Customer, the date the Company accepted the order; or
- (b) for a Contract arising from a quotation from the Company, the date the Company receives written notification of acceptance of the quotation or, if the Company receives no written notification of acceptance of the quotation, the date the Company receives a form of acceptance that the Company (in its absolute discretion) treats as a valid acceptance;

'Customer' shall mean the customer, any person acting on behalf of or with the authority of the customer, or any person purchasing goods or services from the Company.

#### 1.2 'Event of Default' means any of the following:

- (a) the Customer fails to comply with the Contract or any other Contract or agreement with the Company;
- (b) the Customer is subject to any event which is in the nature of dissolution, winding up, bankruptcy, liquidation, insolvency or receivership, or which generally precedes such an event;

- (c) an event occurs or information becomes known to the Company, which in the Company's opinion, might materially affect the Customer's creditworthiness, the value of the Goods, or the Customer's ability or willingness to comply with its obligations under the Contract or any other Contract or agreement with the Company;
  - (d) any guarantor of the Customer's obligations under the Contract is in default under any agreement between the guarantor and the Company;
- 1.3 'Goods' shall mean all goods supplied by the Company to the Customer, including, but without limitation, structural steel beams and welded components.
- 1.4 'Services' shall mean all services provided by the Company to the Customer and shall include without limitation the provision of all steel work, installation, all charges for labour and work, hire charges, insurance charges, all costs and charges associated with a change to the original order or quote, or any fee or charge whatsoever associated with the supply of services by the Company to the Customer.

'GST' means Goods and Services Tax.
- 1.5 'PPSA' means the Personal Property Securities Act 1999.

'Price' means the price of Goods and (if applicable) any incidental services between the Company and the Customer, subject to any variation in accordance with these Terms and, unless specifically agreed otherwise in writing, is expressed before the addition of GST and any other applicable taxes and duties.
- 1.6 Headings do not affect the interpretation of these Terms.
- 1.7 Unless the context requires otherwise, the following words and phrases (and grammatical variations of them) used in these Terms have the meanings given to them in, or by virtue of, the PPSA: 'after-acquired property', 'at risk', 'financing statement', 'future advance', 'goods', 'inventory', 'perfection', 'personal property', 'proceeds', 'purchase price', 'security agreement', 'security interest' and 'verification statement'.
- 1.8 A reference to an enactment includes that enactment as amended or substituted and includes any regulations made under that enactment.
- 1.9 A reference to any part under these Terms includes that party's successors and permitted substitutes and assigns.
- 2. CONTRACT**
- 2.1 These Terms shall be read subject to the express terms and conditions contained in the Company's quotation or contained in the Company's confirmation of order.
- 2.2 All other conditions, warranties, guarantees, descriptions, representations, conditions as to fitness or suitability for any purpose, tolerance to any conditions, merchantability, appearance, safety, durability or otherwise (whether of a like nature or not) and whether express or implied by law, trade custom or otherwise, are expressly excluded.
- 2.3 If there is a conflict between the Customer's order and the Company's confirmation of order (including these Terms), the Company's confirmation of order (including these Terms) will prevail.
- 2.4 An agent or representative of the Company is not authorised to make any representations, warranties or agreements that a director of the Company has not confirmed in writing. The Company is not bound by unauthorised statements. Unauthorised statements cannot form a contract, or part of a contract, collateral to the Contract.
- 2.5 The rights, powers and remedies provided for in the Contract (including these Terms) are in addition to, and do not limit or exclude (or otherwise adversely affect), any right, power or remedy provided to the Company by law.

2.6 The Customer's obligation to pay amounts (other than the Price) to the Company under these Terms shall be continuing and separate obligations which will survive termination of the Contract and payment of the Price.

### **3. VARIATIONS**

3.1 Any requested variation to the Goods or work covered by the Company's quotation must be notified in writing by the Customer. If the Company agrees, the Company's quotation and the Price will be adjusted accordingly. If a variation is agreed after the Contract is formed, the Contract and the Price will be adjusted accordingly.

3.2 Should the Customer request the Company to work overtime or extra shifts, the Price will be adjusted to reflect the increase in cost caused thereby based on the excess rates paid and working hours recorded.

3.3 The Price will be adjusted to reflect any extra cost or expense incurred by the Company because of any instruction received from the Customer or any action or inaction on the part of the Customer.

### **4. QUOTES**

4.1 Where a quotation is given by the Company for goods and services:

4.1.1 The quotation shall be valid for one month from the date of issue; and

4.1.2 The quotation shall be exclusive of Goods and Services Tax unless specifically stated to the contrary.

4.2 Where goods or services are required in addition to the quotation the Customer agrees to pay for the additional costs of goods or services.

4.3 The Company shall not be responsible for any errors or omissions caused by the mutilation or incorrect transmission contained in a facsimile message, electronic mail or other means of transmission in which the Customer has accepted the Company's quote.

### **5. PRICE**

5.1 The Price is the Company's current price for the Goods and any incidental services as at the Contract Date or (if applicable, and subject to clauses 3 and 4) the Price quoted by the Company.

5.2 Where no price is stated in writing or agreed to orally the goods or services shall be deemed to be sold at the current price applying at the date on which the invoice for the goods or services is issued to the Customer.

5.3 The price may be increased by the amount of any reasonable increase in the cost of supply of the goods or services that is beyond the control of the Company between the date of the contract and delivery of the goods

5.4 Where the Customer requests the Company to estimate the quantity of the Goods to be supplied from sketches, plans, schedules, specifications or otherwise, the Customer agrees to pay for any variation between the estimate and the actual quantities supplied and the Contract shall be deemed to be adjusted accordingly.

### **6. PAYMENT**

6.1 Payment for goods or services shall be made in full on or before the 20th day of the month following either the month in which the invoice is issued or the month in which the goods are delivered, whichever is the earlier ("the due date").

6.2 The Company may, at any time, require the Customer to pay the Price by letter of credit, bank cheque, post-dated cheque or to secure payment of the Price by providing an assignment of debt, lien, mortgage, charge, guarantee or any other form of security.

6.3 The Company shall, without prejudice to any other remedy available to it at law, be entitled to treat any failure to make payment on the due date as a repudiation of the Contract by the

Customer. In no event shall the Company be obliged to make any delivery of Goods if any moneys due and payable by the Customer under any other Contract remain outstanding.

- 6.4 All expenses, costs, fees and disbursements including legal and debt collection agency fees incurred by the Company in recovering the Price and any other amounts payable under these Terms shall be recoverable from the Customer as part of the purchase price.
- 6.5 Without limiting the application of clause 6.1, if the Company decides to issue a payment claim pursuant to the Construction Contracts Act 2002 then the progress payment set out in the payment claim shall become due and payable as set out in the said Act being 20 working days after the payment claim is served on the Customer.

## **7. DEFAULT PENALTY**

The Company may charge the Customer a Default Penalty on any moneys due but unpaid under the Contract which will be calculated on a daily basis at a rate of 2.5 per cent per month. The Default Penalty is payable from the date payment is due until the date the Company receives payment. The Company's right to charge the Default Penalty is without prejudice to any of the Company's rights, powers or remedies arising after the Customer's payment default.

## **8. DELIVERY**

- 8.1 Delivery of the Goods will be made at the Customer's premises unless the Customer has instructed otherwise. If the Customer fails to take delivery, the Goods are deemed to have been delivered when the Company was willing to deliver them and the Customer shall pay the Company an amount equal to any extra cost the Company incurs for either transport or storage or both.
- 8.2 The Company accepts no responsibility for delay in delivery howsoever caused.
- 8.3 Delivery of goods shall be deemed completed when the Company gives possession of the goods for delivery to the Customer, or possession of the goods is given to a common carrier, or other bailee for the purposes of transmission to the Customer.
- 8.4 The time agreed for delivery shall not be an essential term of this contract unless the Customer gives written notice to the Company making time of the essence.
- 8.5 Where the Company delivers goods or provides services to the Customer by instalments and the Company fails to deliver or supply one or more instalments the Customer shall not have the right to repudiate the contract but shall have the right to claim compensation as a severable breach.
- 8.6 The Customer shall be deemed to have accepted the goods unless the Customer notifies the Company otherwise within 10 working days of delivery of the goods to the Customer.
- 8.7 No goods will be accepted for return by the Company without prior approval.

## **9. PROPERTY**

- 9.1 Property in, ownership of and title to the Goods shall not pass to the Customer until:
- (a) the Customer pays the Amount Owing in full and all other amounts owing under other Contracts; or
  - (b) (if applicable) the Customer resells the Goods pursuant to the authority granted by these Terms.
- 9.2 Until property in Goods passes to the Customer, the Customer holds the Goods as the Company's bailee and, as agent for the Customer, the Company (and its employees and agents) may, without prior notice, enter upon any land or premises where the Company believes the Goods are kept in order to inspect the Goods. The Customer must store the Goods so they can be identified separately from the Customer's own goods. The Company authorises the

Customer, in the ordinary course of the Customer's business, to use the Goods or resell them for full consideration.

This authority is revoked immediately if:

- (a) an Event of Default occurs; or
- (b) the Company notifies the Customer in writing that this authority is revoked.

9.3 The goods remain at the Company's risk until the delivery to the Customer, but when title passes to the Customer pursuant to clause 9.1 of this contract the goods are at the Customer's risk whether delivery has been made or not.

## **10. LIABILITY**

10.1 The Company will not be liable for:

- (a) failure to deliver the Goods by a specified date;
- (b) an event beyond the Company's control;
- (c) failure of the Goods howsoever arising;
- (d) testing the Goods;
- (e) deterioration of the Goods due to exposure to the elements after delivery;
- (f) any negligence, misrepresentation or other act or omission by the Company or its agents; or
- (g) any loss or damage resulting directly, or indirectly, from any of the above.

10.2 Despite anything else, any liability of the Company arising under the Contract will not exceed the value of the replaced Goods in relation to which the liability has arisen.

## **11. RETURN OF GOODS**

11.1 Except as provided in this clause, the Customer is not entitled to return the Goods to the Company for any reason. For defective Goods which the Customer is entitled to reject, the Company's liability is limited to either (at the Company's discretion) repairing or replacing the Goods, or refunding the Price provided that:

- (a) the Customer must notify the Company within 7 days of delivery that the Goods are defective;
- (b) the Company is given a reasonable opportunity to investigate the Customer's claim;
- (c) the Company will not be liable for Goods which have been tampered with or modified without the Company's approval or which have not been stored or used in a proper manner; and
- (d) the Company will not be liable to pay the Customer any amount more than the amount (if any) the Company actually receives from the supplier for the defective Goods.

11.2 The Company may (in its discretion) accept the Goods for credit but this will incur a handling fee of such amount as the Company may determine (and notify to the Customer) and the amount of any credit will be less any freight costs.

## **12. FABRICATION**

12.1 If the Company fabricates the Goods, the Company warrants the fabrication against faulty workmanship for a period of 6 months from the date of delivery of the Goods.

12.2 The Company warrants that the fabricated Goods will substantially conform with written specifications supplied by the Customer.

- 12.3 A claim under this clause must be in writing to the Company (addressed to the Company Director) within 6 months from the date of delivery of the Goods and no claim can be made under this clause unless and until the Price is paid in full. The Customer must also give the Company notice of any defect in the Goods within 7 days of the defect becoming apparent.
- 12.4 The Company's liability under this clause will be limited in its sole discretion to:
- (a) restoring the Goods in conformity with the written specifications supplied by the Customer; or
  - (b) replacing the Goods.
- 12.5 Any repairs will be done at such place as the Company specifies and the Customer is responsible for cartage of the Goods or parts of the Goods as is necessary to and from the place so specified.
- 12.6 The repair of the Goods under this clause does not include the cost or removal of defective material and fixing replacement material.
- 12.7 The warranty under this clause does not apply to the Goods repaired by any person not authorised by the Company and does not apply if the Goods are used for purposes other than that for which they were intended.

### **13. DEFAULT**

- 13.1 If an Event of Default occurs, and without prejudice to any other rights, powers or remedies the Company may have:
- (a) the Company may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the Contract (and any other Contract), or cancel all or any part of any order with the Customer which remains unperformed;
  - (b) all Amounts Owing shall immediately become due and payable notwithstanding that the due date for payment has not arisen; and
  - (c) the Company may enforce any security interest granted to it by the Customer.
- 13.2 The Company will not be liable to the Customer for any loss or damage the Customer suffers because the Company exercises any rights, powers or remedies after the occurrence of an Event of Default, including under this clause.
- 13.3 The Customer agrees that, at any time after an Event of Default has occurred or at any time if any Goods are at risk, the Company may:
- (a) take possession of any Goods; and/or
  - (b) sell or dispose of any Goods in such manner and generally on such terms and conditions as the Company thinks fit,

and, in each case, otherwise do anything the Customer could do in relation to the Goods. The Company and the Customer agree that section 109(1) of the PPSA is contracted out of in respect of particular Goods if and only for so long as the Company is not the secured party with priority over all other secured parties in respect of those Goods. As agent for the Customer, the Company (and its employees and agents) may, without prior notice, enter upon any land or premises where the Company believes the Goods are kept in order to take possession of and/or remove them. The Customer agrees to procure all other rights (including consents) necessary to enable, and to indemnify the Company (and its employees and agents) against any liability incurred in connection with, such entry, taking of possession and removal.

### **14. MISCELLANEOUS**

- 14.1 The Customer shall not assign all or any of its rights or obligations under this contract without the written consent of the Company.

- 14.2 The Company shall not be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond its control.
- 14.3 Failure by the Company to enforce any of the terms and conditions contained in this contract shall not be deemed to be a waiver of any of the rights or obligations the Company has under this contract.
- 14.4 The law of New Zealand shall apply to this contract except to the extent expressly negated or varied by this contract.
- 14.5 Where the terms of this contract are at variance with the order or instruction from the Customer, this contract shall prevail.
- 14.6 Any dispute shall be determined in accordance with the provisions of the Arbitration Act 1996.
- 14.7 If any provision of this contract shall be invalid, void or illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 14.8 Failure by the Customer to meet credit worthiness will constitute reason for cancellation of contract by the Company without incurring any costs.

#### **15. CONSUMER GUARANTEES ACT 1993 ('CGA')**

- 15.1 If the Customer is not a consumer as defined in the CGA or the Customer acquires or holds itself out as acquiring the Goods under the Contract for the purposes of a business, nothing in the CGA will apply to the supply of the Goods.
- 15.2 In the case of any Customer (to which clause 15.1 does not apply), the provisions of the Contract (including these Terms) will only apply to the extent that such provisions do not limit or exclude any provisions of the CGA and will take effect subject to the provisions of the CGA.

#### **16. CONSTRUCTION CONTRACTS ACT 2002**

- 16.1 The parties acknowledge that all provisions of the Construction Contracts Act 2002 shall apply to this contract except where inconsistent with this contract.
- 16.2 The parties further acknowledge that all provisions of the said Act, including those sections listed in section 10 of the said Act, shall apply to this contract even if it is a residential construction contract as that term is defined by the said Act.

#### **17. PPSA**

- 17.1 To the extent permitted by law, the Customer and the Company contract out of:
- (a) section 114(1)(a) of the PPSA; and
  - (b) the Customer's rights referred to in sections 107(2)(c), (d), (h) and (i) of the PPSA.
- 17.2 The Customer waives its right to receive a copy of any verification statement in respect of any security interest granted to the Company by the Customer.
- 17.3 The Customer agrees to indemnify the Company, upon demand, for all costs and expenses (including legal fees) incurred by the Company:
- (a) as a result of the occurrence of an Event of Default (including upon actual or attempted enforcement of any security interest granted to the Company by the Customer); and
  - (b) in complying with any demand made under section 162 of the PPSA.
- 17.4 On the request of the Company, the Customer shall promptly do all things (including signing any delivery docket and/or invoice) and provide all information necessary to enable the Company to perfect and maintain the perfection of any security interest granted to the Company by the Customer (including by registration of a financing statement).

## **18. PATENTS AND COPYRIGHT**

- 18.1 Copyright in all drawings, specifications and other technical information provided by the Company concerning the Contract is vested in the Company.
- 18.2 If the Goods are to be supplied to the Customer's design, the Customer warrants that the manufacture and supply of the Goods by the Company will not infringe any patent, copyright, registered design or other rights of any other person. The Customer agrees to indemnify the Company against any liability it incurs (including any costs and expenses) as a result of any claim that the manufacture or supply of the Goods by the Company infringes any patent, copyright, registered design or other rights of any other person.

## **19. WAIVER AND SEVERABILITY**

- 19.1 All the rights, powers, exemptions and remedies of the Company remain in force despite any neglect, forbearance or delay in enforcing them. The Company will not be considered to have waived any right, power, remedy or condition unless the waiver is in writing under signature of either the Company or Director. The waiver applies only in a particular transaction, dealing or matter unless the Company agrees otherwise.
- 19.2 If any part of the Contract (including these Terms) is held by any court to be illegal, void or unenforceable, such determination shall not impair the enforceability of the remaining parts of the Contract (including these Terms) or any other Contract.

## **18. COMPLIANCE WITH LAWS**

The Company will comply with all legislation, codes and standards specified in the Contract and the Company is under no liability for a failure to meet any other legislation, codes or standards. If, after the Contract Date, there are any changes in any legislation, codes or standards with which the Company must comply, then the Customer agrees to reimburse or pay to the Company an amount equal to any additional costs incurred by the Company relating to such compliance.

## **19. ASSIGNMENT AND CHANGE OF NAME, ETC.**

- 19.1 The Customer may not assign any of the Customer's rights or obligations under the Contract without the Company's prior written consent.
- 19.2 The Company may assign any of the Company's rights under the Contract without the Customer's consent.
- 19.3 The Customer must give the Company (addressed to the Company Director) not less than 14 days' prior written notice of any proposed change in the Customer's name and/or any other change in the Customer's details (including, but not limited to, changes in the Customer's address, facsimile number, trading name or business practice).

## **20. TRUSTEE LIABILITY**

If the Customer is a trust, the Contract will bind each trustee of that trust and each trustee personally. The Company's rights against each trustee will only be limited if the trustee is an independent trustee (not being a trustee who has a right to or interest in any of the assets of the trust except in the trustee's capacity as trustee of that trust). The liability of an independent trustee shall be limited to the assets of the trust. However, this shall not affect the liability of an independent trustee who has guaranteed, in his or her personal capacity, the Customer's obligations under the Contract.

## **21. REVIEW OF TERMS**

The Company reserves the right to review any of these Terms at any time and from time to time. If, following any such review, there is any change to these Terms that change will take effect from the date on which the Company gives notice to the Customer of such change.

## **22. TWO OR MORE CONTRACTS**

Where, at any time, there is an Amount Owing under two or more Contracts, the Company may apply a payment made by the Customer under the Contract in such manner (including in such order and to any



amounts owing to the Company, including under another Contract) as the Company thinks fit (despite any direction to the contrary and whether before or after any default by the Customer). The security interest provided for by these Terms and created by the Contract also secures the Amount Owing under any other Contract, and each Contract (and these Terms) shall be construed accordingly.

### **23. AGREEMENT TO MORTGAGE**

23.1 For better securing the price of the goods or services supplied pursuant to these Terms of Trade, the Company shall have the right to mortgage or charge the property of the Customer to which the goods and services are being supplied, or any other property owned by the Customer.

23.2 The terms of such a mortgage shall incorporate such covenants and conditions as are included in Memorandum of Mortgage 2007/4240, or the most current Auckland District Law Society all obligations Memorandum, which Memorandum(s) is registered at the various land registries of Land Information New Zealand.

23.3 The Customer hereby irrevocably nominates and appoints the Company to be the attorney of the Customer for the purposes of giving and executing in favour of the Company a registrable Memorandum of Mortgage as described in clause 22.1.

23.4 For the purposes of this clause "property" means real property.

### **24. AGENCY**

24.1 The Customer authorises the Company to contract either as principal or agent for the provision of goods or services that are the subject matter of this contract.

24.2 Where the Company enters into a contract of the type referred to in clause 24.1 it shall be read with and form part of this agreement and the Customer agrees to pay any amounts due under that contract.