

# GENERAL CONDITIONS OF SALE

## 1. GENERAL

- (a) Any tender or quotation is made on the condition that the following provisions shall apply to all orders given to and accepted by the Company unless they are expressly excluded or varied in the Quotation or in subsequent correspondence.
- (b) Any tender or quotation by the Company shall remain open for placement of an order by the Purchaser within 30 days.
- (c) Any order given in respect of a Quotation or tender is not legally binding on the Company unless and until accepted by the Company in writing. Telephone orders must be confirmed in writing.
- (d) Subject to Clauses 1(c) and 2, the contract resulting from acceptance of an order by the Company ("Contract") may not be varied, amended or in any other manner altered other than by written agreement signed by both parties.

## 2. CANCELLATION OF ORDERS

Orders accepted by the Company may not be cancelled in whole or in part by the Purchaser without the Company's written consent. A fee amounting to 20% of the contract value will be charged on cancellation. In addition, the Company reserves the right to charge for its work-in-progress and disbursements relating to the Order as a condition of acceptance of cancellation.

## 3. QUOTATION AND PRICE VARIATION

- (a) All prices quoted ("the Quotation Price") are based on the Company's estimated cost of production, manufacture or supply at the time of Quotation and are exclusive of GST. The company reserves the right to vary the Quotation Price without notice to the Purchaser at any time prior to delivery if there is any increase in the cost of production, manufacture or supply between the date of Quotation and the date of delivery.
- (b) The quoted price shall be adjusted to allow for any variations which occur in such costs prior to completion of the works as follows:
  - (i) **Labour and Materials:** Escalated price  $P_i = P_o \times (0.10 + 0.9L \times Li/Lo + 0.9M \times Mi/Mo)$ .  
 Where:  $P_o$  = Base Rate  
 $L$  = Percent Labour in Quoted product.  
 $Li$  = Labour Index of month of delivery.  
 $Lo$  = Base Labour Rate (Month of Quotation)  
 $M$  = Percent Material in Quoted product.  
 $Mi$  = ABS Material Index of month prior to delivery.  
 $Mo$  = Base ABS Material Index (month prior to quotation)
  - (ii) **Rate of Exchange, Customs Duty, Primage and Freight**  
 In the case of goods procured by the Company from overseas any price quoted is based on the rate of exchange, customs duty, primage, customs clearance, freight and any other charges in this regard at the date of Quotation, and any variations will be to the Purchaser's account.
- (c) Prices quoted are subject to Purchaser's order being for the whole of the goods or services specified. Prices quoted are unpacked ex works Clayton. Any extra costs incurred as a result of instructions or lack of instructions from the Purchaser or interruptions caused by delays in work for which the Company is not responsible will increase the contract price by the value of such extra costs.

## 4. DELIVERY TIME

The delivery time specified in the Quotation shall date from the acceptance by the Company of a written unconditional and irrevocable order and receipt by it of full engineering and technical details. The Company shall not be liable for any loss or damage arising as a result of failure to deliver in the time specified if such failure arises from events beyond the Company's control nor whilst the purchaser is in breach of these conditions of sale. Any period of delay resulting from such events will automatically be added to the time specified for delivery. It will be the customer's responsibility to find and pay the costs of suitable protected storage if for any reason we are prevented from delivery to customer's site.

## 5. TERMS OF PAYMENT

- (a) Payment Period - Payment shall be made in Australian dollars, without any deductions whatsoever as follows:
  - (i) Merchant Sales - 30 days from date of invoice.
  - (ii) Repairs & Service Work - 14 days from date of invoice.
  - (iii) All other work:
    - 10% of contract sum payable with order;
    - 100% of value of work completed to a maximum of 85% of contract sum on monthly invoice within 14 days;
    - 5% of contract sum due at time of taking over and payable within 30 days from date of invoice.

Payment for price variation is due 30 days from date of invoice. If any payment is not received within the Payment Period, interest on such claims for payment will accrue from the day after the expiration of the Payment Period at a rate equal to two percent (2%) per annum (calculated weekly) in excess of the base lending rate charged by the National Australia Bank as its reference rate in Australia.
- (b) For goods destined for export and/or orders placed by a Purchaser resident outside Australia, payments are to be effected via confirmed irrevocable letter of

credit payable against presentation of invoices and where appropriate, shipping documentation. L/C confirmation and other establishment costs are to the purchaser's account.

- (c) The company reserves the right to vary the terms of payment and to require payment in cash in full or the provision of such security as the Company considers appropriate prior to delivery should creditworthiness of the Purchaser at any time become in the Company's opinion unsatisfactory.

## 6. PROPERTY, RISK AND INSURANCE

- (a) Property in and title to the goods supplied to the Purchaser or supplied at the point of delivery agreed between the company and the Purchaser shall remain with the Company and shall only pass to the Purchaser upon payment in full to the Company of all monies owing by the Purchaser under the contract on any account. Prior to such payment in full, the Purchaser shall hold the goods as bailee for the Company and store the goods separately in such a way that the goods may be readily identified as being the property of the Company. In the event of the goods being sold or disposed of by the Purchaser prior to such payment in full, any amount received by the Purchaser shall be set aside in a separate account and held in trust by the Purchaser for the Company pending payment in full. The Purchaser shall be under a fiduciary duty to immediately account to the Company upon the receipt of any payment received by it for the goods. The Company's title under this clause shall not be affected by the attachment of the goods to plant, equipment, vehicles, trailers or other property of the Purchaser.
- (b) If any payment by the Purchaser to the Company is overdue in whole or in part, the Company may (without prejudice to any of its other rights) recover and resell the goods and may enter upon the Purchaser's premises by its servants or agents for that purpose.
- (c) The goods shall be insured by the Company until those goods are despatched. The Purchaser shall effect and maintain adequate insurance against loss or damage to the goods during the time between ex works delivery and payment in full. In the event that proceeds of such insurance are received prior to payment in full for the goods such proceeds may at the option of the Company be applied in or towards such payment.
- (d) The goods shall be deemed to have been taken over by the Purchaser upon departure from the Company's works (Ex-works) or when delivered (F.I.S. order) or on completion of tests and/or commissioning on site (when included in the quotation) or 3 (three) calendar months after date of delivery if commissioning is delayed by factors beyond the Company's control, or one calendar month after it shall have been put into commercial use (whichever may be the earlier). The time of taking over shall not be delayed on account of additions, minor omissions or defects which do not materially affect the commercial use of the goods..

## 7. INDEMNITY

The Purchaser indemnifies and holds the Company harmless from and against all liabilities, losses, damages, costs or expenses incurred or suffered by the Company, and from and against all actions proceedings, claims or demands made against the Company, arising -

- (a) as a result of the Purchaser's failure to -
  - (i) ensure that any safety markings on the goods are adequately displayed; or
  - (ii) bring to the attention of users of the goods safety manuals and updates therefor applicable in relation to the goods; or
  - (iii) otherwise comply with any laws, rules, standards or regulations applicable in relation to the goods or the use of the goods.
- (b) as a result of any other negligence or other breach of duty by the Purchaser; or
- (c) as a result of compliance or adherence by the Company with any instructions of the Purchaser in relation to the goods or services and from and against all actions, proceedings, claims or demands made against the Company as a result of such compliance or adherence.

## 8. DRAWINGS AND DIMENSIONS

- (a) All drawings, plans, specifications and any other written or printed matter accompanying a Quotation or otherwise in the Purchaser's possession or custody before or after acceptance of an order do not form part of the Contract and may not form part of the Contract and may not be relied upon by the Purchaser. Copies of drawings, plans, specifications and any other written or printed matter submitted to the Purchaser shall remain the property of the Company and the information contained therein shall be treated as strictly confidential and shall not be used to the advantage of the Purchaser or to the detriment of the Company.
- (b) All the Company's quotations, specifications, sketches and drawings remain the property of the Company and must neither be used nor disclosed to third persons without our written authority, and are to be returned upon request.

## 9. PATENT RIGHTS

The Purchaser warrants that any Design, Instruction or Equipment furnished to the Company by or on behalf of the Purchaser shall not be such as will cause the Company to infringe any patent, registered design, trademark, copyright or involve the unauthorised disclosure of confidential information in the execution of the Purchaser's order and the Purchaser agrees to indemnify the Company against any infringement or threatened infringement or allegation of unauthorised use of patents, trademarks, designs, copyright or confidential information arising out of the manufacture or use of the goods and it is specifically agreed that the sale and purchase of the goods does not

confer on the Purchaser any licence or rights under any patents, designs, trade-marks, copyright or confidential information which is the property of the Company. The Company shall be under no obligation to disclose the methods or techniques used in production.

#### 10. ASBESTOS MATERIALS

Unless specifically mentioned otherwise in a quotation, the Company's work does not include the removal or disturbance of asbestos materials from existing plant or buildings when carrying out installation or repairs. If asbestos materials are encountered then it will be the Purchaser's responsibility to make the building or plant safe before work by the Company continues.

#### 11. WARRANTY AND LIMITATION OF LIABILITY

- (a) It is hereby acknowledged by the Company that, under applicable State, Territory and Commonwealth law, certain conditions and warranties may be implied in the contract between the Company and the Purchaser and rights and remedies conferred upon the Purchaser as the consumer in relation to goods or services which cannot be excluded, restricted or modified by agreement ("Non-excludable Rights"). The rights conferred upon the Purchaser by this Warranty are in addition to and do not detract from any Non-excludable Rights which the Purchaser may have. Subject to any Non-Excludable Rights which the Purchaser may have the Company disclaims all conditions and warranties expressed or implied, and all rights and remedies conferred on the Purchaser, by statute, the common law, equity, trade, custom, or usage or otherwise howsoever and all such conditions, warranties, rights and remedies are hereby expressly excluded. Where so permitted the liability of the Company for a breach of a Non-excludable Right is limited, at the Company's option, in the case of goods, to the replacement or repair of the goods or the supply of equivalent goods or the cost of replacing or repairing the goods or of acquiring equivalent services again or the payment of the cost of having the services supplied again.
- (b) The goods (excepting material supplied by the Purchaser and excepting refractory material [refractory warranty applies to design and workmanship only] and excepting heat resisting alloys, salt and metal melting pots or baths) are warranted to be free of defects resulting from faulty materials and workmanship for a period of twelve (12) months from the time of taking over and the Company will replace any defective parts subject to Clause 11(a) and the following:
- (i) the Company shall be advised in writing of any defect within one (1) week of the defect being known;
  - (ii) the defective part being returned on demand to the Company;
  - (iii) the Purchaser has fulfilled his financial obligations;
  - (iv) the Purchaser has not attempted to repair, adjust, improve or otherwise interfere with the goods or its related operating procedures or has submitted the goods to unreasonable stress or treatment. Any such action shall cause this warranty to become null and void;
  - (v) without limiting the foregoing, in the Company's opinion the goods have at all times been properly used in accordance with the Company's instructions.
  - (vi) The cost of dismantling and reinstating the unit, and the transportation of defective and/or replacement parts to and from our central Works, are not the Companies liability unless specifically accepted in writing by the Company; and
  - (vii) Proprietary goods not of the Companies manufacture are excluded from this warranty and are limited to the warranty offered by the specific supplier.
- (c) Except as expressly provided in Clause 11(a) and 11(b), neither the Company its employees nor its agents shall be liable (whether before or after discharge of the Contract or otherwise) for any loss or damage to the Purchaser as user arising from or caused or contributed to by negligence of the Company, its servants or agents, nor shall the Company be liable for special, incidental, indirect or consequential loss or damage suffered by the Purchaser as user as a result of a breach by the Company of its obligations under this Warranty or otherwise including but not limited to economic loss, loss of profits or revenue or costs arising from the loss of use of the equipment or cost of a substitute product.

#### 12. BACKCHARGES

In the event that the purchaser elects not to employ the Company for supervision of installation and start-up in regard to the goods supplied, and as a result, does not notify the Company in writing in advance of the expenditure in each instance of alleged discrepancies and/or omissions in the equipment, the Company will not accept any backcharge. The Company must validate in each instance, in writing, any alleged discrepancies and/or omissions in the equipment prior to accepting any backcharges.

#### 13. ENTIRE AGREEMENT

The matters contained in the Quotation and these General Conditions of Sale constitute the entire agreement between the parties and no representations, warranties, guarantees or other terms or conditions, whether express or implied and whether oral or in writing in relation to the subject matter of the Contract shall be of any force or effect unless contained in the Quotation and these General Conditions of Sale and the purchaser hereby irrevocably waives any right it may have to bring an action under Sections 51 A, 52 or 53 of the Trade Practices Act 1974 (Cth) or Section 11 of the Fair Trading Act 1985 (Vic) or under the corresponding provision of the Fair Trading Act of any other State in respect of any statement, representation, conduct or omission by or behalf of the Company.

#### 14. INCONSISTENT CLAUSE

These General Conditions of Sale shall prevail over any terms or conditions to the contrary contained in the Purchaser's order. Any terms and conditions of the Purchaser's order deviating from or inconsistent with these General Conditions of Sale are expressly excluded and any statement the Purchaser's terms and conditions shall prevail is also excluded.

#### 15. DISPUTES AND ARBITRATION

If any dispute shall arise in connection with the Contract which cannot be settled amicably between the Purchaser and the Company, either party may give written notice to the other of the existence of such dispute and the same shall then be referred to a person or persons to be mutually agreed upon by the parties, or failing agreement, some person appointed for that purpose by the President for the time being of the Institution of Engineers, Australia. Any person appointed pursuant to the Clause shall act as an expert and not as an arbitrator. Both parties agree to accept the standard conditions of the said Institution of Engineers and also agree to accept the decision of the expert as final and binding.

#### 16. WAIVER

Failure by the Company to insist upon strict performance of any term, warranty or condition of the contract shall not be deemed to be a waiver thereof or of any rights the Company may have and no express waiver shall be deemed a waiver of any subsequent breach of any term, warranty or condition.

#### 17. NOTICES

- (a) Any notice required or authorised to be given or served upon a party pursuant to the Contract shall be in writing and shall be delivered personally or sent by facsimile transmission (confirmed by subsequently delivery), or post to the relevant party at its address as appearing in the Quotation or in the Purchaser's order;
- (b) A notice given or served in accordance with sub-clause (a) shall be deemed to have been received -
- (i) in the case of a notice delivered personally, at the time of delivery;
  - (ii) in the case of a notice sent by facsimile transmission, at the time of receipt or subsequent delivery, whichever is the earlier.
  - (iii) in the case of a notice sent by post to an address within Australia, on the third working day following the day of posting.

#### 18. SEVERANCE

It is agreed by the Company and the Purchaser that if any provision of these terms and conditions is determined to be void, voidable by any party, unenforceable or illegal, it shall be read down so as to be valid and enforceable or, if it cannot be so read down, the provision (or where possible, the offending words) shall be severed from the Contract without thereby affecting the validity, legality or, enforceability of the remaining provisions (or parts of those provisions) of the Contract which shall continue in full force and effect.

#### 19. GOVERNING LAW

This contract shall be governed by and construed in accordance with the laws of the State of Victoria and the Purchaser hereby submits to the non-exclusive jurisdiction of the Courts of that State and of all Courts which may hear appeals therefrom.

#### 20. AUSTRALIAN STANDARD

The General Conditions of Contract (AS2124-1992) ("Australian Standard") will apply to matters not covered in these General Conditions of Sale or the Quotation. In the event of any inconsistency between these General Conditions of Sale and the Australian Standard, these General Conditions of Sale shall prevail.