

ITW NEW ZEALAND LTD - Terms and Conditions of Trade

1. DEFINITIONS

- 1.1 "Seller" shall mean ITW NEW ZEALAND LTD trading as ITW FASTEX NEW ZEALAND and its successors and assigns.
- 1.2 "Customer" shall mean the Customer and any person acting on behalf of and with the authority of the Customer.
- 1.3 "Guarantor" means that person (or persons), or entity that agrees herein to be liable for the debts of the buyer on a principal debtor basis.
- 1.4 "Goods" shall have the same meaning as section 2 of the Sale of Goods Act 1908 and are the goods supplied by the Seller to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "Services" shall mean all services supplied by the Seller to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined supra).
- 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and Customer subject to clause 4 of this contract.

2. ACCEPTANCE

- 2.1 Any instructions received by the Seller from the Customer for the supply of Goods shall constitute acceptance of the Terms and Conditions contained herein.
- 2.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these Terms and Conditions by the Customer the Terms and Conditions are irrevocable and can only be rescinded in accordance with these Terms and Conditions or with the written consent of the manager of the Seller.
- 2.4 None of the Sellers agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.
- 2.5 The Customer undertakes to give the Seller not less than (7) days prior written notice of and proposed change in the Customers name and/or any change in the Customers details (including but not limited to changes in the Customers address facsimile phone number or business practice) and change of ownership.

3. GOODS / SERVICE

- 3.1 The Goods and/or Services are as described on the invoices, quotation, estimate, work authorisation or any other work commencement forms as provided by the Seller to the Customer.
- 3.2 Delivery of Goods in volume from the Seller to the Customer may be subject to discrepancies of a margin of 5% over or under. Unless otherwise agreed in writing this margin shall be charged or deducted respectively on a pro rata basis.

4. PRICE and PAYMENT

- 4.1 At the Sellers sole discretion the Price shall be either:
 - (a) The Price shall be as indicated on invoices provided by the Seller to the Customer in respect of Goods supplied; or
 - (b) The Price shall be the Sellers current price of the Goods according to the Sellers current Price list; or
 - (c) The Price of the Goods shall, subject to clause 4.2, be the Sellers quote/estimate Price, which shall be binding upon the Seller provided that the Customer shall accept in writing the Sellers quotation within 30 days.
- 4.2 Any variation from the plan of scheduled work or specification will be charged for, on the basis of the Sellers quotation/estimate and will be shown as extras on the invoice. Payment for extras must be made in full at the time of completion.
- 4.3 At the Sellers sole discretion a deposit may be required. The deposit amount or percentage of the price will be stipulated at the time of order of the Goods/Services and shall become immediately due and payable.
- 4.4 Time for payment of the Goods/Services shall be of the essence and will be stated on the invoice, quotation or any other forms. If no date is stated then payment shall be on delivery of the Goods/Services.
- 4.5 At the Sellers sole discretion, payment for approved Customers shall be due on 20th of each month following the date of an invoice/statement posted to the Customers address or addresses for notices.
- 4.6 Payment will be made by cash, cheque, bank cheque or direct credit, or any other method as agreed to between the Seller and the Customer.
- 4.7 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable except to the extent that such taxes are expressly included in any quotation/estimate given by the Seller.

5. DELIVERY OF GOODS

- 5.1 Delivery of the Goods shall be made to the Customers address. The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Customer at the Sellers address.
- 5.2 Delivery of the Goods to a carrier, either named by the Customer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Customer, is deemed to be a delivery of the Goods to the Customer.
- 5.3 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purpose of this agreement.
- 5.4 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.5 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.
- 5.6 The Seller may deliver the Goods by separate instalments (in accordance with an agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract.
- 5.7 All transportation cost and insurance of the Goods provided by the Seller to the Customer shall be the Customer's responsibility.

6. RISK

- 6.1 If the Seller retains property in the Goods nonetheless all risk for the Goods passes to the Customer on delivery.
- 6.2 If any of the Goods are damaged or destroyed prior to the property in them passing to the Customer, the Seller is entitled, without prejudice to any of its other rights to remedies under these Terms and Conditions (including the right to receive payment of the balance of the Price of the Goods) to receive all insurance proceeds payable in respect of the Goods. This applies whether or not the Price has become payable under these Terms and Conditions. The production of these Terms and Conditions by the Seller is sufficient evidence of the Sellers rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

7. DEFECTS / RETURNS

- 7.1 The Customer shall inspect the Goods and shall within seven (14) days of delivery notify the Seller of any alleged defects, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Seller the opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall conclusively be presumed to be in accordance with the Terms and Conditions and free from any defect or damage.
- 7.2 For defective Goods which the seller has agreed in writing that the Customer is entitled to reject, the Sellers liability is limited to either (at the Sellers sole discretion) replacing the Goods or repairing the Goods provided that:
 - (a) the Customer has complied with provisions of Clause 7.1
 - (b) the Seller will not be liable for Goods which have not stored or used in a proper manner.
 - (c) the Goods are returned in the condition in which they were delivered and with all packaging material as is reasonable and possible in the circumstances.

8. WARRANTY

- 8.1 Subject to the conditions of warranty set out in clause 8.2 the Seller warrants that if any defect in any workmanship manufactured by the Seller becomes apparent and is reported to the Seller (time being of the essence) then the Seller will (at the Sellers sole discretion) repair the defect or replace the workmanship.
 - (a) All physical properties, statements and recommendations of the products are either based on tests or experiences that the Seller believes to be reliable, but they are not guaranteed.
- 8.2 The conditions applicable to the warranty given by clause 8.1 are:
 - (a) The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - 1) Failure on the part of the Customer to properly maintain any Goods; or
 - 2) Failure on the part of the Customer to follow any Instructions or guidelines provided by the Seller; or
 - 3) The Customer is solely responsible for determining whether the product is suitable for the Customers application. Accordingly the Seller will not be responsible for the results or consequences of any misuse or application of the Sellers products; or
 - 4) The continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - 5) Fair wear and tear, any accident or act of God.
 - (b) The warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Sellers consent.
 - (c) In respect of all claims the Seller shall not be liable to compensate the Customer for and delay in either replacing or repairing the workmanship/Goods or in assessing the Customers claim.

9. DEFAULT & CONSEQUENCES OF DEFAULT

- 9.1 Interest on over due invoices shall accrue from the date when payment becomes due and daily until the date of payment at the rate of 2.5% compounding per calendar month and shall accrue at such a rate after as well as before any judgement.
- 9.2 If the Customer defaults on payment of any invoice when due, the Customer shall indemnify the Seller from and against all of the Sellers costs and disbursements including on a solicitor and own client basis and in addition all of the Sellers nominees cost of collection.
- 9.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligations (including those relating to payment) the Seller may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the Terms and Conditions. The Seller will not be liable to the Customer for any loss or damage the Customer suffers because the Seller exercised its rights under this clause.
- 9.4 If any account remains unpaid at the end of the second month after supply of the Goods or Services the following will apply: An immediate amount shall be levied for administration fees which sum shall become immediately due and payable in addition to interest payable under clause 9.1 here of.
- 9.5 In the event that:
 - (a) any money payable to the Seller becomes overdue or in the Sellers opinion the Customer will be unable to meet its payments as they fall due; or
 - (b) the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer then without prejudice to the Sellers other remedies at Law.
 - (d) the Seller shall be entitled to cancel all or part of the order of the Customer which remains unperformed in addition to and without prejudice to and other remedies; and
 - (e) all amounts owing to the Seller shall, whether or not due for payment, immediately become due and payable.

10. TITLE

- 10.1 It is the intention of the Seller and agreed by the Customer that property in the Goods shall not pass until:
 - (a) the Customer has paid all amounts owing for the particular Goods and;
 - (b) the Customer has met all other obligations due by the Customer to the Seller in respect of all the contracts between the Seller and the Customer, and that the Goods, or proceeds of the sale of the Goods, shall be kept separate until the Seller has received payment and all other obligations of the Customer are met.

10.2 It is further agreed that:

- (a) until such time as ownership of the Goods shall pass from the Seller to the Customer the Seller may give notice in writing to the Customer to return the Goods or any of them to the Seller. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease.
- (b) if the Customer fails to return the Goods to the Seller then the Seller or the Sellers agent may enter upon and into land and premises owned or occupied or used by the Customer or at any premises as the invitee of the Customer to where the Goods are situated and take possession of the Goods without being responsible for any damage caused.

11. PERSONAL PROPERTY SECURITIES ACT 1999

- 11.1 Upon assenting to these Terms and Conditions in writing the Customer acknowledges and agrees that:
 - (a) These Terms and Conditions constitute a security agreement for the purpose of the PPSA and;
 - (b) A security interest is taken in all Goods previously supplied by the Seller to the Customer and all Goods that will be supplied in the future by the Seller to the Customer during the continuance of the parties relationship.
- 11.2 The Customer undertakes to:
 - (a) Sign any further documents and/or provide any information. Such information to be complete and accurate and up to date in all respects which the Seller may reasonably require to register a financing statement or financing charge statement on the Personal Properties Security Register.
 - (b) Indemnify and upon demand reimburse the Seller for all expenses incurred in registering a financing statement or financing charge statement on the Personal Properties Security Register or releasing any Goods charged thereby;
 - (c) not registering a financing charge statement or a charge demand without the prior written consent of the Seller;
 - (d) give the Seller not less than fourteen (14) days prior written notice of any proposed change in the Customers name and/or any other changes in the Customers details (including but not limited to change to the Customers address contact numbers or business practice) and;
 - (e) the Customer will immediately give advice to the Seller of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 11.3 The Seller and the Customer agree that nothing in sections 114(1)(a) 133 and 134 of the PPSA shall apply to these Terms and Conditions.
- 11.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 11.5 Unless otherwise agreed to in writing by the Seller the Customer waives its rights to receive a verification statement in accordance with section 148 of the PPSA.
- 11.6 The Customer unconditionally ratifies any action taken by the Seller under and by virtue of the power of attorney given by the Customer to the Seller under clauses 11.1 to 11.5

12. SECURITY & CHARGE

- 12.1 Despite anything to the contrary contained herein or any other rights which the seller may have, howsoever;
 - (a) Where the Customer and/or the Guarantor (if any) is the owner of land, realty or other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Sellers nominee to secure all amounts and other monetary obligations payable under the Terms and Conditions. The Customer and/or the Guarantor acknowledge and agree that the Seller (or the Sellers nominee) shall be entitled to lodge where appropriate a caveat and that caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
 - (b) Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses the Customer and/or Guarantor shall indemnify the Seller from and against all the Sellers costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) To give effect to the provisions of clause 12.1(a) to (b) inclusive hereof the Customer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Seller or the Sellers nominee as the Customers and/or Guarantors true and lawful authority to execute mortgages and charges (whether registrable or not) including such other Terms and Conditions as the Seller and/or the Sellers nominee shall see fit in his/her/its/their absolute discretion against the joint and or several interest of the Customer and/or the Guarantors in any land realty or asset in favour of the Seller and in the Customers and/or the Guarantors name as may be necessary and other acts including instituting any necessary legal proceedings and further to execute all or any documents in the Sellers absolute discretion which may be necessary or advantageous to give effect to the position of this clause.

13. INTELLECTUAL PROPERTY

- 13.1 Where the Seller has designed or drawn Goods for the Customer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Customer at the Sellers discretion.
- 13.2 Conversely, in such a situation, where the Customer has supplied drawings, the Seller in its sale conditions may look for indemnity (the specifications and design of the Goods (including the copyright, design right or other intellectual property in them) shall as between the parties be the property of the Seller).
- 13.3 Where any design or specifications have been supplied by the Customer for manufacture by or to the order of the Seller then the Customer warrants that the use of those designs or specifications for the manufacture processing assembly or supply of the Goods shall not infringe the rights of any third party.
- 13.4 The Customer warrants that any designs or instructions to the Seller will not cause the Seller to infringe any patent registered design or trademark in the execution of the Customers order.

14. CANCELLATION

- 14.1 The Seller may cancel these Terms and Conditions or cancel delivery of the Goods and Services at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay the Customer any sums paid in respect of the price for the Goods. The Seller shall not be liable for any loss or damage arising from such cancellation.
- 14.2 At the Sellers sole discretion the Customer may cancel delivery of Goods and/or Services. In the event that the Customer cancels delivery of Goods and/or Services the Customer shall be liable for any cost incurred by the Seller up to the time of cancellation.

15. PRIVACY ACT 1993

- 15.1 The Customer and the Guarantors (if separate to the Customer) authorises the Seller to collect, retain and use any information about the Customer, for the purpose of assessing the Customers creditworthiness or marketing any Goods and services provided by the Seller to any other party.
- 15.2 The Customer authorises the Seller to disclose any information obtained to any person for the purpose set out in clause 15.1
- 15.3 Where the Customer is a natural person the authorities under (clause 15.1 and 15.2) are authorities or consents for the purpose of the Privacy Act 1993.

16. BUYERS DISCLAIMER

- 16.1 The Customer hereby disclaims any right to rescind or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him to any servant or agent of the Seller and the Customer acknowledges that he buys the Goods relying solely on his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the manufacturer which warranty shall be personal to the Customer and shall not be transferable to any subsequent Customer.

17. CONTRACTUAL REMEDIES ACT

- 17.1 The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if section 15(d) of the Act which states that nothing in the Act shall affect the Sale of Goods Act 1908 were omitted from the Contractual remedies Act 1979.

18. UNPAID SELLERS RIGHTS TO DISPOSE OF GOODS

- 18.1 In the event that:
 - (a) the Seller retains possession or control of the Goods; and
 - (b) payment of the Price is due to the Seller; and
 - (c) the Seller has made demand in writing to the Customer for payment of the price of Goods in terms of this contract; and
 - (d) the Seller has not received the Price of the Goods, then, whether the property in the Goods has passed to the Customer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Customer the loss to the Seller on such disposal.

19. LIEN

- 19.1 Where the Seller has not received or been tendered the whole of the price, or the payment has been dishonoured, the Seller shall have;
 - (a) a lien on the Goods;
 - (b) the right to retain them for the price while the Seller is in possession of them.
 - (c) a right of stopping the Goods in transit whether or not delivery has been made or ownership has passed; and
 - (d) a right of resale
 - (e) the foregoing right of disposal, provided that the Lien of the Seller shall continue despite the commencement of proceedings or judgement for the price having been obtained.

20. GENERAL

- 20.1 All Goods and Services supplied by the Seller are Subject to the laws of New Zealand and that the Seller takes no responsibility for changes in the Law that affect the Goods and Services supplied.
- 20.2 If any provision of these Terms and Conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected or prejudiced or impaired.
- 20.3 The Seller shall be under no liability whatsoever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of any breach by the Seller of these Terms and Conditions. The Customer waives any claims against the Seller for any cost other than the purchase price of the Goods supplied.
- 20.4 The Customer shall not set off against the Price amounts due from the Seller.
- 20.5 Neither party shall be liable for any default due to an act of God, terrorism, war, earthquake strike, lock out, industrial action, flood, storm or other event beyond the reasonable control of either party.
- 20.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Customers consent.
- 20.7 The Seller shall not be liable for errors or omissions arising from oversight or a misinterpretation of the Customers verbal instruction.
- 20.8 The Seller reserves the right to review these Terms and Conditions at any time and from time to time. If following any such review there is to be any change in the Terms and Conditions that change will take effect from the date on which the Seller notifies the Customer of such change.
- 20.9 The Seller will store tooling belonging to the Customer free of charge. The Customer acknowledges and agrees that the Seller has no responsibility for theft/damage of the tooling whilst in storage with the Seller. Further, insurance of the tooling is the Customers responsibility.