

## TERMS AND CONDITIONS OF TRADE

### 1. APPLICATION

- (a) Unless otherwise agreed in writing by Engineering & Generator Services Limited (**Seller**) and the purchaser (**Purchaser**) these terms and conditions of trade (**Terms**) will apply to the supply of any goods (including generators and generator equipment, component goods and any related goods) by the Seller to the Purchaser (**Goods**).
- (b) If there is any inconsistency between a provision of these Terms and any provision in any other written agreement between the Purchaser and the Seller, the provisions will apply in the following descending order:
- (i) the provisions in any written agreement between the Purchaser and the Seller signed by the Seller; and
  - (ii) the provisions in these Terms,
- provided that the provisions of these Terms will prevail over any other terms and conditions stipulated by the Purchaser or included as part of any Purchaser documentation unless those terms and conditions have been agreed to in writing by the Seller.
- (c) The Seller may amend these Terms at any time in its sole discretion. The amended Terms will apply in respect of all Orders placed with the Seller following the date the amended Terms are provided to the Purchaser in writing.

### 2. ORDERS

- (a) The Purchaser will place written orders with the Seller for Goods in accordance with the Seller's specified ordering process and in accordance with any minimum order quantities specified by the Seller from time to time (**Order**). **Each Order** will constitute an offer to purchase the Goods by the Purchaser. Each offer to purchase goods will only be deemed to be accepted by the Seller sending written confirmation of the Order to the Purchaser or by the supply of the Goods to the Purchaser.
- (b) The Seller may in relation to any Order accept the Order or decline to accept the Order in whole or in part, in its sole discretion. Orders are accepted by the Seller subject to the Seller's ability to supply the Goods. Notwithstanding acceptance of an Order, the Seller may cancel or refuse to supply any Order at any time in its sole discretion.
- (c) Any Order accepted by the Seller may not be revised, altered or cancelled by the Purchaser once accepted by the Seller unless consented to in writing by the Seller.

### 3. PRICE AND PAYMENT

- (a) The price payable for any Goods supplied to the Purchaser (**Price**) will be:
- (i) the price agreed between the parties; or
  - (ii) in the absence of any agreement between the parties, the Seller's prices applicable for the Goods at the time of the acceptance of the Order by the Seller.
- (b) The Seller may, by not less than 30 days prior written notice to the Purchaser, amend any Price in its sole discretion. The amended Price will apply in respect of all Orders accepted by the Seller after the expiry of the notice period.
- (c) The Seller will invoice the Purchaser the Price for all Goods ordered on a monthly basis (**Invoiced Amount**).
- (d) The Purchaser will pay the Invoiced Amount in full and without deduction or set off by the 20th of the month following the date of the invoice or where the Seller has agreed to any credit terms, the Invoiced Amount will be payable by the Purchaser on the date specified by the Seller in any invoice (**Due Date**).
- (e) Unless expressly stated in writing, the Price excludes GST (and any other relevant taxes and duties (if any)) which will be payable by the Purchaser in addition to the Price.
- (f) If the Purchaser fails to pay any amount owing to the Seller in full on or before the Due Date, the Seller may, without prejudice to any other right or remedy the Seller may have:
- (i) charge the Purchaser (who will pay the Seller on demand) default interest at 2% per month on the overdue amount, calculated daily from the Due Date until the date on which payment of the overdue amount is made in full;
  - (ii) charge the Purchaser (who will pay the Seller on demand) all costs (including all legal costs on a solicitor-client basis and all collection costs) incurred by the Seller in the collection of such overdue amounts; and
  - (iii) refuse to deliver any Order, cancel or suspend any Order, place any overdue account on hold or stop providing credit facilities to the Purchaser and any related entity of the Purchaser.

### 4. DELIVERY

Delivery will be deemed to take place when the Goods are made available for collection by the Purchaser from the Seller's premises (**Delivery**). If the Seller agrees to arrange for the transportation of any Goods from the Seller's premises on behalf of the Purchaser:

- (a) the transportation of such Goods is at the Purchaser's expense;
- (b) the Goods will be properly and suitably packed by the Seller and in such manner as to reach the intended destination in good condition under normal conditions of transport;
- (c) the Seller will act as the agent for and on behalf of the Purchaser and will not be liable for, or responsible for, any damage that occurs after Delivery, provided that it has complied with clause 4(b); and
- (d) the Seller will not be liable to the Purchaser for any loss of revenue, loss of profits or any other indirect or consequential losses or liabilities incurred by the Purchaser on account of any Goods not being delivered on any specified date.

### 5. RISK AND TITLE

- (a) Unless otherwise agreed in writing, all risk of loss, damage, deterioration or destruction to the Goods will pass to the Purchaser on Delivery. Title to any Goods will not pass to the Purchaser until the Seller has received payment in full for all Goods supplied to the Purchaser.
- (b) Until title to the Goods passes to the Purchaser under clause 5(a) the Purchaser will:
- (i) hold the Goods as a bailee only;
  - (ii) clearly designate the Goods as the Seller's property and store the Goods in such a way that they are identified as the Seller's property; and
  - (iii) maintain the Goods in good order and condition and preserve the Goods in their present form.
- (c) Without prejudice to the Seller's other rights and remedies, the Seller will be entitled to retake possession of any Goods at any time prior to payment in full being received for those Goods. The Purchaser grants the Seller an irrevocable right and authority to enter onto any place where such Goods are situated, or thought to be situated at any time, and to take and resell the Goods and to retain the proceeds from such sale. Any shortfall arising from such sale will be a debt due and owing to the Seller by the Purchaser.

### 6. PERSONAL PROPERTY SECURITIES ACT 1999

- (a) The Purchaser acknowledges that the retention of title in clause 5 gives rise to a security interest in all present and after acquired Goods supplied by the Seller to the Purchaser to secure the Purchaser's performance of its obligations to the Seller.
- (b) The Purchaser undertakes to:
- (i) promptly do all things, execute all documents and/or provide any information which the Seller may reasonably require to enable the Seller to perfect and maintain the perfection of its security interest (including by registration of a financing statement);
  - (ii) give the Seller not less than 14 days' prior written notice of any proposed change in its name and/or any other change to its details; and
  - (iii) immediately on request by the Seller (and at the Purchaser's expense) obtain from any third party such agreements and waivers of any security interest that third party has in the Goods, to ensure that at all times the Seller has a first priority security interest in the Goods.
- (c) The Purchaser waives its rights to receive a copy of any verification statements under the PPSA and agrees that as between the Seller and the Purchaser:
- (i) the Purchaser will have no rights under (or by reference to) sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 133 and 134 of the PPSA; and
  - (ii) where the Seller has rights in addition to those in Part 9 of the PPSA, those rights will continue to apply.

### 7. RETURN OF GOODS

- (a) Any claims by the Purchaser that any Goods supplied do not correspond to the relevant Order, or that any Goods received are defective, must be made in writing to the Seller within 20 working days after Delivery.
- (b) If no claim is received by the Seller within the 20 working day period the Purchaser will be deemed to have irrevocably accepted the Goods.
- (c) If a claim is made by the Purchaser in accordance with clause 7(a):
- (i) the Purchaser will advise the Seller of the defect in the Goods complained of and seek the Seller's permission to return those Goods to the Seller for verification (at the Purchaser's cost); and
  - (ii) subject to verification, and on receipt of the Goods returned:
    - (A) if the Seller supplied incorrect or defective Goods, the Seller will (at the Purchaser's election) either issue a credit note for the Goods or, if possible, transport the applicable replacement Goods to the Purchaser at no additional cost to the Purchaser; or
    - (B) if the Seller has not supplied incorrect or defective Goods, or the claim is made outside the applicable period, then the Seller will return the Goods to the Purchaser at the cost of the Purchaser and the Purchaser will have no further claim against the Seller in relation to those Goods.

### 8. LIMITATION OF LIABILITY

- Without prejudice to clause 7, the Purchaser acknowledges and agrees that:
- (a) the Seller is not liable to the Purchaser in any manner in connection with any breach of these Terms, other than to compensate the Purchaser for the cost of replacement of any Goods pursuant to clause 7; and
- (b) nothing expressed or implied in these Terms will confer any liability on the Seller for any consequential, indirect or special loss, damage, cost or expense suffered or incurred by the Purchaser as a direct or indirect result of:

- (i) a breach by the Seller of any of its obligations under these Terms; or
- (ii) any use of the Goods otherwise than in accordance with any relevant specifications notified by the Seller to the Purchaser.

**9. NO WARRANTIES**

- (a) Except as expressly warranted by the Seller in respect of any specific Goods, the Seller makes no representation, warranty or undertaking (whether express or implied) in relation to any Goods (including as to the merchantability, quality, or condition of the Goods, compliance with the description of the Goods, the suitability or fitness of the Goods for the Purchaser's purposes, or the use of the Goods) and to the maximum extent permitted by law, all such representations, warranties and undertakings are negated and excluded.
- (b) Where the Purchaser is acquiring, or holds itself out as acquiring, any Goods for the purposes of a business, in terms of section 43(2) of the Consumer Guarantees Act 1993 (**Act**), the Purchaser will not assert or attempt to assert any rights or claims against the Seller under the provisions of the Act.
- (c) The Purchaser acknowledges that it is not relying on the Seller's skill or judgment as to the suitability or otherwise of the Goods for any purpose.
- (d) Where the Purchaser on-sells any Goods to consumers who purchase those Goods for business purposes, the Purchaser will contract out of the Act in the same manner as provided in clause 12(b). If the Purchaser fails to do so, the Purchaser will indemnify the Seller against any claim, expense or loss suffered or incurred by the Seller as a direct or indirect consequence of such failure.

**10. PRIVACY**

The Purchaser agrees that any information about the Purchaser provided at any time to the Seller may be used by the Seller for any purpose connected with the Seller's business including (but not limited to) direct marketing, debt collection and credit reporting or assessment. The Seller is authorised to provide such information to any external agency or party for credit information and assessment purposes and that agency or party is authorised by the Purchaser to use and continue to use such information as part of its business services. The Seller and any external agency or party may retain and/or use such information for as long as they see fit.

**11. GENERAL**

- (a) The Purchaser will not assign or otherwise transfer its rights or obligations under these Terms to any person without the prior written consent of the Seller.
- (b) To the extent permitted by law, the Seller will not be liable for any act, omission or failure by it under these Terms if that act, omission or failure results directly or indirectly from an event or circumstances beyond the reasonable control of the Seller.
- (c) Any waiver by a party of any of its rights or remedies under these Terms will be effective only if it is recorded in writing and signed by a duly authorised senior representative of that party. If the waiver relates to a breach of any provision of these Terms, this will not (unless stated otherwise) operate as a waiver of any other breach of that provision. No waiver of any breach, or failure to enforce any provision, of these Terms at any time by either party will in any way affect, limit or waive that party's right to subsequently require strict compliance with these Terms.
- (d) If any provision of these Terms is or becomes invalid or unenforceable, that provision will be deemed deleted from these Terms. The invalidity or unenforceability of that provision will not affect the other provisions of these Terms, all of which will remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.
- (e) These Terms are governed by the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to these Terms.