

STANDARD TERMS AND CONDITIONS OF SALE

Last updated: 19-9-23

1 Application

- 1.1 These terms and conditions (the “**Terms**”) apply to the sale of all Goods and provision of all Services to the person specified in the relevant Purchase Order or relevant Proposal (as the case may be) as the Customer (referred to in these Terms as “**you**”, and “**your**”) by the Group Company specified in the relevant Purchase Order or relevant Proposal (as the case may be), or, if no Group Company is specified, Brightwater Engineering Limited (referred to in these Terms as “**we**” “**our**” or “**us**”).
- 1.2 Notwithstanding any term or condition to the contrary which you may purport to apply under any Purchase Order, confirmation of order, or similar document, these Terms are to the exclusion of all other terms and conditions, unless expressly agreed in writing between us and you.
- 1.3 Any Purchase Order issued by you that purports to order the provision of Goods and/or Services:
 - a will be deemed to be an offer by you to purchase those Goods and/or Services pursuant to these Terms;
 - b will not be accepted, or deemed to have been accepted, by us unless and until we expressly acknowledge such request or, if earlier, we deliver the Goods to you or perform the Services for you.
- 1.4 We may also issue a Proposal to you that sets out the basis of our offer to provide Goods and/or Services to you, which is capable of your acceptance (which must be given in writing) for the period specified in the Proposal or if no period is so specified, for a period ending on the date that is 10 working days after the date of the Proposal, at which time the Proposal will be deemed to have been withdrawn (and provided that we may at any time prior to your acceptance of the Proposal withdraw the Proposal by notice to you).
- 1.5 Each:
 - a Purchase Order, once accepted by us; or
 - b Proposal, once accepted by you,will be deemed to form an individual and legally binding contract between us and you on the terms and subject to the conditions in these Terms (a “**Contract**”).
- 1.6 We may amend these Terms from time to time by publishing an amended version of these Terms on our website at www.brightwater.co.nz, and the amended Terms will apply to all Contracts (including variations from a Change Request) entered into by you and us following the publication of such amended Terms. No changes may be made to these Terms, or waiver given, without our prior written consent.

2 Definitions

In these Terms, unless the context otherwise requires:

“**Affiliate**” means in relation to any person, a company, trust (or the trustees of a trust acting in their capacity as trustees), partnership, corporation, association or any other legal entity, which Controls such person, or is Controlled by such person, or is under common Control with such person, including subsidiary or parent companies of such person;

“**Control**” means direct or indirect ownership of more than 50% of the voting rights in any legal entity, and/or the ability to control the direction and management of any person, whether through contract, ownership of shares, or otherwise;

“**Change Request**” has the meaning given to it in clause 5.1;

“**Contract**” has the meaning given to it in clause 1.3;

“**Deliverables**” means any designs, specifications, drawings, diagrams, images, or other materials that we deliver to you in connection with any Services;

“**Delivery**” means delivery of the Goods in the manner contemplated by clause 9.1;

“**Dispute**” has the meaning given to it in clause 19.1;

“**Facility**” means our engineering and manufacturing facility at 7 Spencer Place, Brightwater 7020, Nelson, New Zealand;

“**Force Majeure Event**” has the meaning given to it in clause 16;

“Goods” means all goods, equipment, machinery, parts, components, materials and any other personal property supplied from time to time by us to you;

“Group Company” means Brightwater Group Holdings Limited (company number 6465572), Brightwater Engineering Limited (company number 7797037), and any of their Affiliates;

“Indemnified Persons” means us, our Affiliates, and us and our Affiliates’ directors, officers, agents, employees and contractors;

“Insolvency Event” means that:

- a you cease or take steps to cease to conduct your business in the normal manner;
- b you go into receivership or have a receiver, trustee, or manager (including a statutory manager) appointed;
- c you enter into voluntary administration;
- d you are unable to pay your debts when they are due or are presumed to be unable to pay your debts as they fall due;
- e you make an assignment for the benefit of, or enter into or make any arrangement or composition with, your creditors; or
- f any resolution is passed or any proceeding is commenced for your winding up or liquidation (whether on a voluntary or involuntary basis);
- g you commit an act of bankruptcy (if applicable);

“Losses” means any and all costs, expenses, damages, losses, liabilities, judgments, fines, penalties (whether civil, criminal or otherwise) and amounts paid or payable in settlement, including all interest, assessments and other charges paid or payable in connection with or in respect of any of the foregoing, and all legal costs and expenses incurred (including solicitor-client costs), but excludes any Losses in respect of which you indemnifying us or agreeing to indemnify us is prohibited by or contravenes applicable law.

“Personnel” means employees, contractors, agents, officers and sub-contractors;

“Proposal” means a proposal, response to tender, quote or other document that we submit to you which sets out the terms on which we are willing to provide Goods and/or Services to you;

“Purchase Order” means an order form, purchase order, or other document that you submit to us and which purports to order Goods and/or Services from us;

“PPSA” means the Personal Property Securities Act 1999, and unless the context otherwise requires, words and phrases have the meanings given to them in or by virtue of the PPSA;

“Services” means any services that we provide, whether in connection with the Goods or otherwise, including any consulting, design or engineering services.

3 Interpretation

In interpreting these Terms and any Contract, the following rules must be applied unless the context otherwise requires:

- a Headings to clauses are for reference only and are not an aid to interpretation.
- b References to statutory provisions are to be construed as references to those provisions as they may be amended or re-enacted or as their application is modified by other provisions from time to time.
- c References to clauses are to clauses of these Terms.
- d References to a party are to a party to these Terms and include that party’s successors in title and permitted substitutes and assigns (and, where applicable, the party’s legal personal representatives).
- e All periods of time include the day on which the period commences and also the day on which the period ends.
- f References to “working day” are references to any day on which registered banks are open for over-the-counter business in Nelson, New Zealand, excluding Saturdays and Sundays;
- g Any date which is not a working day, upon or by which anything is due to be done, will be deemed to be a reference to the next working day.

- h Words importing the plural include the singular and vice versa, and words importing gender import all genders.
- i Any obligation not to do something will be deemed to include an obligation not to suffer, permit, or cause that thing to be done.
- j All warranties, representations, indemnities, covenants, agreements, and obligations given or entered into by, or rights of, more than one person will be deemed to have been given or entered into, or conferred on them, jointly and severally.
- k If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- l A reference to writing includes any method of representing or reproducing words, figures, drawings, or symbols in a visible or tangible form, including by email and other electronic transmission.
- m The use of expressions such as 'includes', 'including', 'for example', and similar expressions, does not limit what might be included, that is, it is not exhaustive.

4 Prices

- 4.1 Unless otherwise agreed in writing any price quoted for the supply of the Goods and/or Services (whether in a Proposal or supplied by us in response to a Purchase Order):
 - a will be exclusive of all freight, insurance, delivery and travel charges; and
 - b will be exclusive of GST which if payable, you must pay at the rate applicable at the time of supply upon receipt of a GST invoice we issue in accordance with the Goods and Services Tax Act 1985; and
 - c will be exclusive of any other taxes, levies or duties.
- 4.2 The price for Goods and/or Services will be as set out in our Proposal (subject to clause 5 below), or if no Proposal is provided then will be calculated pursuant to our standard charges applicable at the time of the Purchase Order.
- 4.3 Unless otherwise specified, all prices are stated in New Zealand dollars.

5 Variations to work or pricing

- 5.1 You may request changes to that specified in the Contract, including additions to or deletions from the Goods and/or Services originally ordered, or in the specifications or drawings relating to those Goods ("Change Request"). Any communications from or on behalf of you (including the provision of any revised drawings or specifications or similar) that we consider represents a change to what is specified in the Contract will be treated as and deemed to be a Change Request for the purposes of the Contract.
- 5.2 We may charge for time spent assessing any Change Request at the standard rates applied by us at the time when such Change Request is made.
- 5.3 Nothing within these Terms will require us to proceed with any Change Request until we have agreed with you the terms on which the Change Request will be processed and undertaken.
- 5.4 We may suspend the Delivery of any Goods (or any work we are undertaking in connection with the Delivery of any Goods) and/or suspend the performance of any Services:
 - a where we have yet to agree with you the terms on which the Change Request will be processed and undertaken;
 - b where we do not have adequate instructions from you to proceed with the work we are undertaking in connection with the Delivery of any Goods or any Services;
 - c where payment is not made by you on the due date (in accordance with clause 6.4); or
 - d where you fail to make payment in cash on or before Delivery of any Goods and/or performance of any Services where we require that under clause 6.3b.

We will not be liable to you for any Losses associated with any such suspension.

- 5.5 We may, at our sole discretion, proceed with a Change Request. If we do, you will pay us the full cost associated with any changes to that specified in the Contract (being our actual costs incurred and the usual margin for overheads and profit that we are applying at the time the work was done).
- 5.6 Without limiting our rights in respect of a Change Request, we may, acting reasonably, make an adjustment to the price or timetable for Delivery of the Goods and/or performance of the Services:

- a If, in relation to any Change Request, we continue work and doing so causes an increase or decrease in our costs or alters the time required for our performance and/or Delivery;
- b if we suspend or cancel any work at your instructions or as a result of one of the matters specified in clause 5.4;
- c if, following the date of entry into a Contract:
 - i we consider (acting reasonably) that our costs have fluctuated materially;
 - ii we incur any increase in our costs due to a requirement to conform with any Act of Parliament, Order in Council or any order, regulation or by-law made with statutory authority by government departments or by local body or other authorities;
 - iii we incur any increase in our costs due to a Force Majeure Event; or
 - iv we incur any increase in our costs arising from a variation in any taxes, duties, or other levies, insurance and freight charges imposed by third parties, or fluctuations in exchange rates.

6 Payment

6.1 Except where the Terms or our Proposal expressly provide otherwise and without limiting clause 6.2, payment of all invoices is due in full by the 20th of the month following the date of invoice.

6.2 Unless we have pre-approved the operation of a credit account in your favour, or as otherwise agreed by us in writing:

- a in respect of Goods, unless we agree that payment of an invoice in respect of Goods may be made after Delivery, we will issue an invoice in respect of each Delivery of Goods prior to the Goods being Delivered, in respect of which you must pay such invoice and/or obtain a letter of credit in our favour and on terms that are satisfactory to us (in our absolute discretion) prior to and as a condition of Delivery of the Goods;
- b in respect of Services, we may, in our discretion, issue an invoice:
 - i periodically and at such intervals as we determine, in our absolute discretion; and/or
 - ii upon completion of the Services.

6.3 Without prejudice to clause 6.1:

- a you must promptly pay:
 - i any deposit required by us at the time we accept your Purchase Order or you accept our Proposal, within the timeframe we may require as a condition of our acceptance of your Purchase Order or as stated in our Proposal (or, if no timeframe is specified, within 48 hours of such acceptance);
 - ii any progress payments we may require for the value of the work completed and for the value of materials to hand or ordered for each item of equipment or Goods to be supplied (for which we may issue an invoice at any time prior to the delivery of the Goods or the completion of the Services).
- b if, at any time, we consider (acting reasonably) your creditworthiness or standing to be unsatisfactory, we may require payment for all further supplies of Goods and/or Services under any Contract to be made in cash on or before Delivery of such Goods and/or performance of such Services.

6.4 If any payment is not made on the due date then, without prejudice to any other remedies available to us (including those set out in clause 7, clause 14 and/or under the PPSA):

- a we are entitled to cancel or withhold supply of the Goods and/or any further Goods and/or performance of further Services; and
- b we are entitled to refuse to commence, or suspend or cancel work (including Delivery of any Goods and performance of any Services) under any Contract with you, without prejudice to any other right or remedy available to us including the right to receive payment for all work carried out to that date plus the right to recover any sums unpaid in respect of any other Contract with you; and
- c we may charge interest on monies overdue charged on a daily rate calculated at a rate equal to the current business unarranged overdraft rate charged to us by our bank plus 5% per annum, from the due date of payment until all amounts owing to us are paid in full;
- d we may declare that all amounts invoiced to you under the relevant Contract and any other Contract then in force are immediately due and payable;

- e we may recover any other costs we incur, including solicitors' fees, in recovery of any monies you owe us.
- 6.5 If we incur any liability to you or any of your Affiliates, whether under these Terms, any Contract, or otherwise, we will be entitled to set-off the amount of such liability against any sum or sums owing by you or any of your Affiliates to us under any Contract.
- 6.6 Notwithstanding clause 6.5, all payments to be made by you under any Contract must be made in full, on the due date, in cleared funds and free of any deduction, withholding, or set-offs.
- 6.7 Notwithstanding any other provision in these Terms or any communication by you to the contrary, we may (in our absolute discretion) apply any monies received from you, whether on account of payment of an invoice or otherwise, to any amount then-owing by you to us under any Contract.

7 Title and security

- 7.1 Title to the Goods will remain with us until:
 - a we have received payment in full of the price for such Goods; and
 - b you have met all your obligations under these Terms in respect of the Goods,and you acknowledge that part-payment of any amount for the Goods does not convey any part, right, title, and/or interest in the Goods.
- 7.2 Without prejudice to any other rights or remedies available to us under these Terms or otherwise, if:
 - a you do not make a payment to us when due under these Terms or does not otherwise comply with these Terms;
 - b you commit or threaten to commit an Insolvency Event; or
 - c the Goods are "at risk" within the meaning of the PPSA,then we will be entitled to enter any premises where the Goods supplied by us are situated, repossess, and/or sell such Goods (subject to these Terms and in accordance with the PPSA).
- 7.3 You must indemnify the Indemnified Persons for any Losses that the Indemnified Persons incur arising out of or in connection with the removal, repossession, and sale of the Goods pursuant to clause 7.2.
- 7.4 By entering into a Contract you grant a security interest to us in:
 - a the Goods supplied by us pursuant to that Contract; and
 - b all proceeds in those Goods,to secure the payment to us of the purchase price of the Goods.
- 7.5 You acknowledge and agree that:
 - a these terms constitute a security agreement for the purposes of section 36 of the PPSA;
 - b you have waived your rights under the PPSA to:
 - i receive any notice that we intend to sell the Goods or to retain the Goods on enforcement of the security interest granted to us under these terms and conditions;
 - ii object to a proposal by us to retain the Goods in satisfaction of any obligation you owe us;
 - iii receive a statement of account on sale of the Goods;
 - iv retain the Goods; and
 - v where any Goods become an accession, not have any Goods damaged when we remove the accession, to receive notice of removal of the accession and to apply to the court for an order concerning the removal of the accession,
 - c nothing in sections 114(1)(a), 113, and 134 of the PPSA will apply to a Contract or these Terms;
 - d all notices to be given pursuant to these Terms will be given in accordance with sections 185 to 189 of the PPSA;
 - e where we have rights in addition to those in Part 9 of the PPSA, those rights will continue to apply and will not be limited by section 109 of the PPSA;
 - f you have received value as at the date of first Delivery of the Goods and have not agreed to postpone the time for attachment of the security interest granted to us under these Terms;

- g you have provided your full and correct legal name to us and will immediately notify us of any change to your name;
- h you irrevocably consent to us, and our agents, without notice and without in any way being liable to any person, entering on to any premises where we reasonably believe that Goods we have supplied to you are situated, for the purposes of inspecting, stock-taking or, in the event that any amount owing to us becomes or has become due and payable, reclaiming any Goods in your possession or control (including any Goods that have become an accession under the PPSA) and to dispose of them or retain them for our benefit;
- i you will reimburse us for any cost we incur in registering, maintaining, discharging, and/or enforcing the security interest created by these Terms;
- j you will sign all such further documents and do all such further acts and things:
 - i as we may reasonably require for the purpose of registering a financing statement or financing change statement on the Personal Property Securities Register;
 - ii as we otherwise deem necessary or desirable to us to ensure that we have a perfected and first-ranking security interest in the Goods.

7.6 Until title to the Goods passes to you in accordance with clause 7.1, we will have a security interest in the Goods and all proceeds of the Goods as contemplated by clause 7.4, and accordingly, you must:

- a return the Goods if requested to do so by us following non-payment of any amount due to us under these terms or non-fulfilment of any of your other obligations under these terms, without prejudice to our other rights and remedies;
- b store the Goods separately from all other of your goods or the goods of any third party;
- c keep the Goods free and clear of all liens, claims, taxes, duties, charges, pledges, encumbrances, or adverse claims of any nature;
- d not register or allow any person to register (or give us a written demand, or require any other person to give us a written demand, requiring us to register) a financing change statement or a change demand in respect of the Goods without our prior written consent;
- e not remove any serial number or other identification number from the Goods that identified the Goods as our property;
- f maintain the Goods in good working condition and repair;
- g keep full and accurate records for the Goods;
- h return the Goods if requested to do so by us, following non-payment of any amount owing to us, or non-fulfilment of any other of your obligations under these Terms, the relevant Contract, or any other agreement, without prejudice to our rights and remedies.

8 Risk

The risk of loss, damage, or destruction of the Goods will pass to you on Delivery, and unless otherwise agreed in writing, we will not be liable for any loss or damage to the Goods arising in connection with the offloading of the Goods following Delivery.

9 Delivery, non-Delivery and storage of Goods

9.1 Unless otherwise agreed in writing, Delivery of the Goods will occur:

- a without limiting our rights under clause 6.2a, at the time and on the date on which the Goods are made available for your collection from the Facility; or
- b if we have agreed in writing to dispatch the Goods by our own transport to a place nominated by you, at the time and on the date on which the Goods arrive at your nominate address for Delivery.

9.2 We will make every reasonable effort to meet quoted or estimated dates for Delivery, but we will not be liable to you for any loss or damage arising from our failure to do so and time will not be of the essence for Delivery under any Contract.

9.3 If Goods are to be Delivered pursuant to clause 9.1b, you will be responsible for arranging and paying for insurance, and the cost of carriage of the Goods will be to your account, unless otherwise stated in the relevant Proposal.

9.4 Unless otherwise agreed in writing, we are under no obligation to insure the Goods at any time but may choose to do so at our sole discretion.

- 9.5 We will not be liable to you or your insurer for any loss or damage that may occur while the Goods are under or at your risk.
- 9.6 When Goods are stored by us at your request or fault after the Goods have been Delivered:
 - a you must pay all applicable storage, transport and other charges;
 - b we may retain the Goods until all such charges have been paid in full.
- 9.7 Our storage of the Goods will not entitle you to postpone payment of any sums due to us.
- 9.8 Any claim by you for loss or damage or for Goods not complying with the specifications set out in the relevant Proposal or the relevant Purchase Order (as the case may be) apparent on inspection, or for non-Delivery, must be made in writing by you within three days after Delivery or after the due date for Delivery (as the case may be).
- 9.9 You must provide full particulars of the alleged loss or damage.
- 9.10 If no such claim is made within three days after Delivery, you will be deemed to have accepted the Goods as Delivered.

10 Warranty

- 10.1 Subject to clause 10.5:
 - a we warrant that, in respect of the Services, we will perform the Services with reasonable skill and care;
 - b we warrant that, in respect of Goods we manufacture (but no other Goods):
 - i we have or will have at Delivery full and valid title to the Goods; and
 - ii for a period of 12 months from Delivery (being the "**Warranty Period**") unless otherwise agreed in writing:
 - A the Goods will be free from material defects in material and workmanship;
 - B the Goods will conform in all material respects with any descriptions in the Purchase Order or otherwise agreed by us.
- 10.2 With respect to Goods that have been manufactured by a third party, we hereby assign to you (by way of present assignment of future rights), with effect from Delivery, the benefit of any warranties in respect of those Goods given by the manufacturer of those Goods (being the "**Manufacturer Warranties**"), to the extent that the Manufacturer Warranties are capable of assignment to you without the need for us to obtain any other person's consent.
- 10.3 During the Warranty Period, we will, at our option, replace or repair Goods that do not meet the warranties set out in clause 10.1 provided that you notify us in writing of any such failure to meet such warranties within 20 working days after that failure becomes, or ought reasonably to have become, apparent to you.
- 10.4 Other than the warranties we give under clauses 10.1 and the Manufacturer Warranties, we give no other warranties nor make any representations, and no terms or conditions are implied (whether under statute or otherwise), in respect of the Goods and/or the Services.
- 10.5 None of the above warranties will apply:
 - a where the defect or failure is caused by or contributed to by:
 - i your wilful act, misuse, negligence or lack of maintenance or by such acts of any other person;
 - ii you not using the Goods in accordance with rating and installation instructions or other specifications of use or care;
 - iii your failure to strictly follow a supplied care plan;
 - iv an event beyond our reasonable control, including any force of nature, earthquake, flood, fire, explosion, riot, war, subsidence, slips;
 - v fair wear or tear;
 - b where you have used the Goods for purposes for which they have not been designed and manufactured; or
 - c where the defect or failure of the Goods is due to instructions or designs or materials or work supplied by you or those you are responsible for.

- 10.6 Goods returned to us in connection with a claim under warranty will be accepted by us for consideration subject to the condition that, should the claim be rejected, all costs incurred including transport to and from our Facility and the costs of inspection will be to your account.
- 10.7 You represent to us that you are acquiring the goods or services 'in trade', and that:
 - a the Goods and/or Services are not of a kind ordinarily acquired for personal, domestic or household use or consumption; or
 - b you are acquiring the Goods and/or Services for resupply in trade, or for using them up or transforming them in the course of a process of production or manufacture in the course of your business.
- 10.8 You and we both agree, to the fullest extent permitted by law, that:
 - a the Consumer Guarantees Act 1993 will not apply to the supply of the Goods or Services; and
 - b sections 9, 12A, 13, and 14(1) of the Fair Trading Act 1986 will not apply to the supply of, or offer to supply, the Goods or Services or otherwise in connection with the relationship between the parties established by this agreement.
- 10.9 You and we both consider that it is fair and reasonable to be bound by clause 10.8.
- 10.10 Without limiting clause 10.9, you acknowledge that:
 - a you were offered an opportunity to negotiate the terms of the Contract;
 - b you were offered the opportunity to obtain independent legal advice in connection with your entry into each Contract, and you have done so (or have waived your rights to do so).
- 10.11 By submitting a Purchase Order or otherwise ordering Goods and/or Services, you confirm that:
 - a you have satisfied yourself that the Goods and/or Services will be fit for the purposes for which you require the Goods and/or Services, and that you are not relying on any statement or representation by or on behalf of us in connection with your decision to order the Goods and/or Services; and
 - b the onus is on you to obtain from us and follow a care plan for the Goods.

11 Confidentiality and privacy

- 11.1 All written instructions, drawings, designs, specifications, manuals and other information which we supply in connection with a Proposal or in response to a Purchase Order are our confidential information ("Confidential Information").
- 11.2 You must not disclose our Confidential Information to any third person or use our Confidential Information in any manner whether in complete form or in any way adapted or altered without our prior written permission.
- 11.3 Any personal information provided to us by you or on your behalf, including the name and contact details of your Personnel may be collected and used by us in connection with the relevant Contract and for marketing purposes and we may disclose such personal information to third parties in connection with that purpose.
- 11.4 You warrant that you are authorised to disclose personal information of your Personnel to us for the purposes described in clause 11.3 and have obtained the consent of each such employee to receive such marketing communications.

12 On site installation

- 12.1 If we agree to undertake the installation of any Goods or undertake any Services at your premises or any other location nominated by you ("Customer Environment"):
 - a you must:
 - i ensure the safety of our Personnel; and
 - ii otherwise comply with the requirements of applicable law, including the Health and Safety at Work Act 2015;
 - b we may take such actions and do such further things as we see fit in the event we consider, in our absolute discretion, that you are not complying with clause 12.1a, and may recover from you the costs of doing so; and

- c without prejudice to clauses 12.1a and 12.1b, you must indemnify the Indemnified Persons for any Losses that the Indemnified Persons incur arising from any injury or damage to Personnel or to property in connection with the Personnel carrying out any work at the Customer Environment.
- 12.2 Installation of Goods by us does not in any way affect the passing of risk in the Goods in accordance with these Terms.
- 12.3 If during or within twelve months after any installation you directly or indirectly retain our employees or independent contractors who carried out or were in anyway involved with the installation you agree that we will have sustained damages. Specific to our employees and independent contractors involved in your installation you agree that:
 - a you will not solicit, interfere or endeavour to entice away from us, or otherwise hire or engage any employee or independent contractor;
 - b if any employee or independent contractor of ours is hired or otherwise engaged by you at any time in period ending on the date that is 12 months after the date of completion of the installation, regardless of how they may have become hired or engaged by you, you will pay us a fee of \$100,000 plus GST and loss of earnings incurred by us; and
 - c the amount of the fee contemplated by clause 12.3b reflects that in the event you hire or engage our employees or independent contractors in breach of clause 12.3a, we will incur significant costs to replace those employees or independent contractors, and is intended to secure, in a reasonable and proportionate manner, your obligations under clause 12.3a in a manner than protects our legitimate interests.

13 Intellectual Property Rights

- 13.1 For the purposes of this clause 13, “**Intellectual Property Rights**” means copyright, patents, trademarks, circuit layouts, design rights, trade secrets, or other industrial or intellectual property rights (in each case, whether registered or unregistered).
- 13.2 As between us and you:
 - a subject to clause 13.3, we or our licensors will retain:
 - i all Intellectual Property Rights in any original design and/or process incorporated in the Goods, and in the Goods themselves; and
 - ii all Intellectual Property Rights in the Deliverables, except to extent such Intellectual Property Rights are retained by you under clause 13.2b;
 - (“**Background IP**”);
 - b subject to clause 13.4, you or your licensors will retain all Intellectual Property Rights in the designs, specifications, drawings and other instructions provided by you to us in connection with a Contract (together, “**Customer Specifications**”).
- 13.3 We hereby grant you a non-exclusive, royalty-free, perpetual licence to use the Background IP, to the extent incorporated in:
 - a any Goods, to enable you to use the Goods for the purposes for which they were manufactured;
 - b any Deliverables, to enable you to use the Deliverables for the purposes for which they were delivered to you, and provided that we may revoke this licence immediately without notice to you if you fail to pay us when due any amount owing by you under a Contract in connection with the Services to which the Deliverables relate.
- 13.4 You hereby grant us a non-exclusive, royalty-free, perpetual, assignable licence (with the right to sub-license) to use the Customer Specifications to manufacture any further goods similar to, or derived from, the Goods and/or to incorporate the Customer Specifications in any Deliverables.
- 13.5 You warrant that our use of the Customer Specifications for the purposes of manufacturing Goods or carrying out any Services (including the creation of any Deliverables) in accordance with these Terms or any Contract will not infringe the Intellectual Property Rights or any other rights of any person.
- 13.6 Without limiting clause 13.5, if any person claims that any Goods manufactured or supplied by us in accordance with the Customer Specifications infringe or any Deliverables delivered by us incorporating or referring to the Customer Specifications or are alleged to infringe any Intellectual Property Rights (“**Claim**”):
 - a you must indemnify the Indemnified Persons for any Losses that the Indemnified Person incur arising from or in connection with the Claim;

- b unless otherwise agreed in writing, we will have full control of any defence or settlement of, or proceedings in connection with, the Claim;
- c you must cooperate with us and follow our reasonable instructions in connection with our response to the Claim; and
- d we may, in our absolute discretion and at your cost, modify or replace the Goods so as to avoid or mitigate the Claim.

14 Default

If we believe (acting reasonably) that you have breached or are likely to breach any of your obligations under these Terms, or are or are likely to become the subject of an Insolvency Event, or if we have suspended work under clause 5.4 for more than 10 working days, then, without prejudice to any other rights or remedies available to us under these Terms (including under clause 6), any Contract or otherwise, we may:

- a terminate the relevant Contract then in force;
- b revoke any credit accommodation provided to you and require that all further supplies of Goods or performances of Services be on a cash on or before Delivery or performance basis; and
- c recover all debt collection and legal expenses, including solicitor/client costs, that we incur in connection with the enforcement or attempted enforcement of these Terms.

15 Termination

- 15.1 Termination of any Contract will not relieve you of your obligation to pay:
 - a all amounts owed to us on any account whatsoever (including amounts owing for work performed and obligations we have legally occurred up to the date of termination), which will be payable immediately notwithstanding that the date for payment of the money may not have arrived; and
 - b cost fluctuation adjustments due and payable up to the date of termination or under the Contract.
- 15.2 Subject to clause 15.3, termination of a Contract will not affect the rights or liabilities of either us or you accrued prior to termination or expiry.
- 15.3 Upon termination of a Contract for any reason, all rights granted to you under that Contract will terminate and you will not be entitled to receive any rebate or refund of the whole or any part of the money paid by you pursuant to that Contract.

16 Force majeure

We will not be liable for any delay or failure in the production or delivery of the Goods or performance of the Services directly or indirectly caused by an event beyond our reasonable control, including: acts of god, pandemics, epidemics, states of civil emergency, regional or global disruptions to supply chains, earthquake, fire, riot, war, embargo, strikes, labour disputes, theft, delays in delivery by suppliers and/or failures by sub-contractors, prohibition of export or import, confiscation, or action or interference by any governmental or other authority (each a **“Force Majeure Event”**). In the event of such failure or delay, we may terminate the relevant Contract immediately by giving written notice to you, or by giving written notice to you may delay Delivery of the Goods or performance of the Services until a reasonable time after the cause of the delay ceases to exist. If we give any such notice or notices, you acknowledge and declare that you will have no claim against us arising from such termination or deferment of Delivery or performance.

17 Liability

- 17.1 No liquidated damages are payable by us unless specifically agreed by us in writing.
- 17.2 Subject to clause 17.3, our total, aggregate liability and that of all Indemnified Persons to you and your Affiliates due to, arising from, or in connection with each Contract and/or the Goods and/or the Services supplied under a Contract, whether in contract, tort (including negligence), breach of statutory duty, arising from our or any Indemnified Person’s misrepresentation, or otherwise will be limited to the lesser of:
 - a \$5,000; and
 - b the amount that you have actually paid for the particular Goods and/or Services under the Contract.

17.3 Neither we nor any other Indemnified Person will be liable to you or your Affiliates due to, arising from, or in connection with each Contract and/or the Goods, and/or the Services supplied under a Contract, whether in contract, tort (including negligence), breach of statutory duty or otherwise for any:

- indirect or consequential loss; or
- economic loss, loss of profit, loss of revenue, loss of production, loss of anticipated savings, wasted expenditures, or loss of reputation (in each case, whether direct or indirect).

17.4 Our and each Indemnified Person's liability to you will be reduced proportionately to account for any loss, damage, liability or cost that is caused by, contributed to, or attributable to any act or omission of you (including your employees or agents) and/or your Affiliates.

17.5 You must indemnify the Indemnified Persons for any Losses that the Indemnified Person incur arising from or in connection with your breach of these Terms or any Contract.

18 Notices

18.1 If you are required to or may give notice to us under these Terms, you may send that notice:

By post, to: Brightwater Engineering Ltd
7 Spencer Place
Brightwater 7022

By email, to: ar.invoices@brightwater.co.nz

By fax, to: +64 3 543 5301

18.2 If we are required to or may give notice to you under these Terms, we may send that notice to an address you provide us in the Purchase Order or to which we address the Proposal (including an email address) or any other address you provide us from time to time.

18.3 For the purposes of these Terms, notices given by us in accordance with clause 18.2 or by you in accordance with clause 18.1 will be deemed to have been received:

- if sent by post, on the second working day after the date posted;
- if sent by email or fax, at the time of transmission by the sender unless the sender was put on notice that the transmission was not successful,

but if the time and day on which a notice would be deemed to have been received in accordance with the above is not between 9.00am and 5.00pm on a working day, the notice will be deemed to have been received at 9.00am on the next working day.

19 Disputes

19.1 If there is any question, dispute, or difference between you and us at any time, in relation to, or in connection with any Contract arising from or in connection with these Terms or any Goods and/or Services ("Dispute"), either party may give notice in writing to the other of the existence of such Dispute, which notice must include sufficient details to allow the other party to understand the Dispute.

19.2 You and we must use all reasonable endeavours to confer at least once to resolve the Dispute or agree on a method of doing so following a notice under clause 19.1. Each party must procure that a representative with sufficient authority will be present at any meeting between the parties.

19.3 If you and we fail to resolve the Dispute within 20 working days after notice has been provided under clause 19.1 and such Dispute does not relate to non-payment of a sum due under a Contract, then either party may by notice require that the Dispute be referred to arbitration to be determined by a sole arbitrator.

19.4 We will attempt to agree an arbitrator, but if we do not agree upon the arbitrator within 10 working days after the Dispute having been referred to arbitration, the arbitrator may be nominated upon application of either of you or us by the President of the Arbitrators' and Mediators' Institute of New Zealand.

19.5 The seat of the arbitration will be New Zealand and the Arbitration Act 1996 will apply to any arbitration under these Terms.

19.6 Nothing in these Terms will prevent us from, at any time, initiating proceedings for the purposes of seeking injunctive or urgent relief or if the Dispute relates to a non-payment of an amount due by you.

20 Assignment and transfer

- 20.1 You must not assign all or any of your rights or benefits under these Terms or any Contract without our prior written consent, which we may withhold in our absolute discretion.
- 20.2 We may assign any or all of our rights and benefits under these Terms or any Contract to any person.
- 20.3 We may at any time transfer our obligations under these Terms or any Contract (a “**Transfer**”), to any of our Affiliates or to any person who acquires all or substantially all of our assets, in which case we will be released from our obligations under these Terms with effect from the date of the Transfer of such obligations and you must execute such agreements or documents and do such things as we may reasonably request to give effect to the Transfer in accordance with this clause.

21 Third parties

- 21.1 Subject to clause 21.2, nothing in these Terms or in any Contract is intended to confer a benefit upon any third party whether under the contractual privity provisions of the Contract and Commercial Law Act 2017 or otherwise.
- 21.2 Clauses 7.3, 12.1c, 13.6a, 17.2, 17.3, 17.4 and 17.5 are intended to be for the benefit of, and to be enforceable under the contractual privity provisions of the Contract and Commercial Law Act 2017 by, an Indemnified Person.
- 21.3 The consent of the Indemnified Persons is not required for any rescission or amendment of these Terms which may be agreed to by the parties, or any termination of any Contract by either party in accordance with these Terms.

22 General

- 22.1 Our failure to enforce or exercise, at any time or for any period of time, any term of any Contract will not constitute, and will not be construed as, a waiver of such term and will in no way affect our right to enforce or exercise it.
- 22.2 The invalidity or unenforceability of any of these terms and conditions of these Terms will not affect the enforceability of the remainder of the terms and conditions of these Terms.
- 22.3 You must not, in relation to the supply of the Goods or performance of any Services by us, give or make any undertaking, assertion or representation in relation to the Goods or Services without our prior approval in writing.
- 22.4 You must ensure all information or documentation provided to us is complete, accurate, and fit for purpose, on which we will be entitled to rely.
- 22.5 These Terms, each Contract, and any Dispute and/or claim arising out of or in connection with their subject matter whether of a contractual or non-contractual nature will in all respects be construed and have effect according to New Zealand law and the New Zealand courts will have exclusive jurisdiction over or in respect of any Dispute (except as may be provided in clause 19).