

# Appendix A

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Services Terms and Conditions of Sale

## STANDARD TERMS AND CONDITIONS OF SALE

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### 1. Incorporation

- 1.1 These terms and conditions between Brightwater Services (referred to herein as “we” “our” or “us”) and the Customer (referred to herein as “the Customer”) shall apply to all orders for goods and/or services provided by us.
- 1.2 Any contract of sale, order, or quotation made or accepted by or on behalf of us will be subject to these terms and conditions of sale.
  - 1.3 Any terms or conditions put forward by the Customer, whether in a purchase order, specification or otherwise, will not be binding on us in so far as they purport to amend, annul or augment any of these terms and conditions unless specifically agreed to in writing by us.

### 2. Prices

- 2.1 Unless otherwise agreed in writing all freight, insurance, delivery and travel charges will be additional to any price quoted.
- 2.2 Unless otherwise agreed in writing any quoted price may be altered prior to delivery of Goods to the Customer, or before the completion of repairs or services by us, if our costs fluctuate materially.
- 2.3 We are entitled to withdraw any quotation before it is accepted, and in any event any quotation will lapse 30 days after it is given without notice.
- 2.4 GST is payable by the Customer in all cases as an additional amount to all prices and charges.
- 2.5 The price for Goods and services will be either as quoted to the Customer in writing or if no written quote is provided then pursuant to our standard charges applicable at the time.
- 2.6 Prices are for goods ex-works unless otherwise agreed in writing in a quotation by us.
- 2.7 No Purchase Order or quotation is binding upon us unless and until signed by the Customer and confirmed by us in writing.

### 3. Payment

- 3.1 Unless it is otherwise agreed by us in writing the Customer must pay for:
  - (a) all Goods ex-works at time of delivery or upon lodgement of claim by us for progress payments;
  - (b) any deposit required by us must be paid at the time when the Customer signs a Purchase Order.
- 3.2 No discount is given for early payment.
- 3.3 Payment in full is due by 20th month following the date on which all Goods are ready for despatch upon completion.
- 3.4 We are entitled to immediate payment for progress payments for the value of work completed and the value of materials to hand for each item of equipment, such payment being due on 20th of month following date of invoice.
- 3.5 If full payment for the Goods or services is not made on the due date then without prejudice to any other remedies available to us then:
  - (a) we are entitled to cancel or withhold supply of further goods;
  - (b) we are entitled to suspend or cancel work (including despatch) on other orders 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 on any previous orders;
  - (c) interest on monies overdue shall be charged on a daily rate calculated by reference to the current BNZ overdraft rates plus 5% per annum and any other costs including solicitor's fees incurred by us in recovery of any monies due.
- 3.6 We have a full right of set-off in respect to amounts owed by the Customer to us in respect of any monies owing to us howsoever arising. The Customer's obligation is to pay the full amount owing to us free of all deductions or rights of set-off.

### 4. Title

- 4.1 The Customer agrees that property in the goods shall not pass until:
  - (a) the Customer has paid in full all amounts owing for the particular goods;
  - (b) the Customer has met all other obligations of the Customer to us in respect of the goods.
- 4.2 By accepting delivery of the goods, the Customer agrees:
  - (a) that these terms constitute a security agreement for the purposes of section 36 of the Personal Property Securities Act 1999 (PPSA);
  - (b) that a security interest exists in all goods (and their proceeds) previously supplied by us to the Customer (if any) and the Customer grants a security interest in all goods (and their proceeds) supplied by us to the Customer now and in the future;
  - (c) to keep full and complete records of the goods until payment in full;
  - (d) to return the goods if requested to do so by us following non-payment of any amount due to us under these terms or non-fulfillment of any other obligation of the Customer under these terms, without prejudice to our other rights and remedies;
  - (e) that it has received value as at the date of first delivery of the goods and has not agreed to postpone the time for attachment of the security interest granted to us under these terms and conditions;
  - (f) to 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 the Customer are situated for the purposes of inspecting, stock-taking or, in the event that any amount owing to us becomes due and payable, reclaiming any goods in the Customer's 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;
  - (g) to keep the goods free and clear of all liens, claims, taxes, duties, charges, pledges, encumbrances, or adverse claims of any nature;
  - (h) that it will not register or allow any person to register a financing change statement or a change demand in respect of the goods;
  - (i) that it will execute all such further documents and do all such further acts and things as we may reasonably require for the purpose of registering a financing statement or financing change statement on the Personal Property Securities Register;

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- (j) that its proper legal name appears below and it will not change its name, address or contact details without providing us with 30 days prior written notice;
  - (k) to waive its rights under the PPSA to:
    - (i) receive a copy of any verification statement;
    - (ii) receive a copy of any financing change statement;
    - (iii) 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;
    - (iv) object to a proposal by us to retain the goods in satisfaction of any obligation owed by the Customer to us;
    - (v) receive a statement of account on sale of the goods;
    - (vi) retain the goods; and
    - (vii) 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; and
  - (l) not to give us a written demand or allow any other person to give us a written demand requiring us to register a financing change statement under the PPSA or enter into or allow any other person to enter into the Personal Property Securities Register a financing change statement under the PPSA.
- 4.3 Terms defined in the PPSA have the same meaning in these terms and conditions.
- 4.4 Where we supply services to the Customer, the Customer agrees that we have legal and equitable title to the Customer's goods or machinery that has been serviced at a value equal to the contribution of the services to the value of the Customer's goods or machinery or property until the Customer pays for the services in full without deduction or set-off.
- 4.5 Delivery by us to a carrier accepted by the Customer or delivery from our premises when we advise we are ready to deliver constitutes delivery. The risk in the goods will pass to the Customer upon the goods being loaded onto transport, except where delivered by our own transport when risk will pass on delivery of the goods to the place designated by the Customer.
- 4.6 Goods may be delivered in installments and in such case each delivery will be regarded as a separate contract, subject to the same payment terms. Failure or delay by us in making delivery at a specified time of one or more installments shall not cancel or repudiate the contract.
- 4.7 Insurance and the cost of carriage of the goods ex-works to the place of delivery designated by the Customer will be to the Customer's account unless otherwise stated in this quotation and the Customer will not hold us responsible for any loss or damage that may occur while the goods are under the risk of the Customer.
- 4.8 When goods are stored by us at the request of or fault of the Customer after the goods are ready for dispatch, the Customer will pay all applicable storage, transport and other charges. Storage will not entitle the Customer to postpone payment of any sums due to us.
- 4.9 Lien: All Goods delivered to or held in our possession, for work or for repair or servicing are all subject to a lien for all sums owing by the Customer to us for work and/or repairs and/or servicing carried out on the Goods. Where we hold a lien over any of the Customer's Goods and the Customer is more than 30 days overdue with any monies owing then we are entitled to proceed to sell those Goods forthwith in such manner and upon such terms as we think fit, and are entitled to utilise the sale proceeds to repay all amounts owing to us together with any expenses of sale."
- 5. Delivery, Non-Delivery and Shortage**
- 5.1 Unless otherwise agreed the Customer is responsible for the cost of and arranging transportation of all Goods ready for despatch. We will not be liable for any delays in meeting quoted despatch dates due to causes beyond our control.
- 5.2 We will make every reasonable effort to meet quoted dispatch dates but we will not be liable to the Customer for any loss or damage whatsoever (including consequential loss) caused by a delay in or prevention of dispatch of goods, including delays in repair, installation or removal of goods at the Customer's site. The term "consequential loss" includes, but is not limited to, loss of profit, loss of production, loss or use of revenue, cost of capital, loss of or damage to property or equipment, and loss of reputation.
- 5.3 The Customer will be deemed to have accepted delivery of goods referred to in any invoice or advice note unless the Customer makes a claim to us within thirty (30) days from the date of the invoice or advice note, except when part of the goods referred to therein are received by the Customer, in which case any claim with respect to the goods not received in accordance with the invoice or advice note must be made within three days of the short delivery.
- 5.4 We will not accept liability for any damage to goods while in transit at our risk or other discrepancies between invoice particulars and goods received unless such damage or discrepancy is reported to us within three days of receipt of the goods.
- 6. Warranty**
- 6.1 Subject to the Consumer Guarantees Act 1993, we warrant goods of our own manufacture (but no other goods) for a period of 12 months from the date of delivery unless otherwise specified in the Purchase Order or any quotation provided by us.
- 6.2 We warrant that we will supply goods in accordance with the descriptions contained in the Purchase Order or attached to the contract for the purpose and agreed by us.
- 6.3 During the warranty period, we will replace, or at our option repair, goods supplied under this contract that are defective and make good any defect in workmanship, supply, installation or repair, provided that the Customer notifies us in writing of any such defect within thirty (30) days of defect becoming apparent.
- 6.4 Any parts not of our manufacture incorporated in our goods or sold by us carry their manufacturer's warranty only, if any.
- 6.5 We will be under no liability to the Customer (whether in contract, tort or otherwise), for any injury, loss or damages (including but not limited to incidental, special, consequential or general damages) in connection with or arising out of the supply or use of goods howsoever arising (including but not limited to injury, loss or damages suffered as a result of advice given by us to the Customer in relation to the type of goods or services the Customer requires or the design of the Customer's systems), whether or not caused by the negligence of us, our employees or agents. The term "consequential damages"

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includes, but is not limited to, loss of profit, loss of production, loss or use of revenue, cost of capital, loss of or damage to property or equipment, and loss of reputation.

- 6.6 In no event, regardless of the form of the claim or cause of action (whether based in contract, infringement, negligence, strict liability, or otherwise), shall our liability to the Customer and/or its Customers exceed the price paid by the Customer for the specific goods giving rise to the claim or cause of action, and the Customer indemnifies us for any damages exceeding the price paid by the Customer for those goods.
- 6.7 None of the above warranties shall apply:
- (a) where the defect or failure is caused by or contributed to by the Customer's misuse, negligent maintenance or not using the goods in accordance with rating and installation instructions or other specifications of use or care or where the Customer has used the goods for purposes for which they have not been designed and manufactured;
  - (b) where the defect or failure of the goods is due to instructions or designs supplied by the Customer; or
  - (c) where the claim does not relate to specific defects in the goods, arising from faulty materials or workmanship, linked to the price of the goods or services or replacement of the goods or services.
- 6.8 Where we elect to remedy defects or faults or warrant a third party to do so, the Customer will in such cases still agree to pay us for the full price of the order agreed between the parties for our execution of the order and provision of the goods or services.
- 6.9 Goods returned to us subject to a claim under warranty will be accepted on the condition that, should the claim be rejected, all costs incurred including transport to and from our premises and inspection will be to the Customer's account.
- 6.10 For the purposes of the Consumer Guarantees Act 1993, the parties agree that the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption and the Customer is acquiring the goods for resupply or for using them up or transforming them in the course of a process of production or manufacture in its business.

### 7. Cancellation

No order accepted by us shall be cancelled without our consent and in such cases, the Customer will be liable to reimburse us for all costs and expenses we incur in fulfilling the order up until and including the date of cancellation. If an order is cancelled with our consent, but the order of goods cannot be cancelled in time from the original manufacturer, the Customer will be held liable for the cost of the goods in total.

### 8. Return of Goods

Any goods which have been supplied in accordance with a Customer's order but which are subsequently returned may be credited at our discretion, provided that they are delivered to us within thirty (30) days of delivery, at the Customer's cost, in the same condition and packaging in which they were dispatched, with a copy of the invoice. When we agree to returns we will charge an administration, restocking and freight fee of 20% of our invoiced price for the goods. No specially manufactured or specially ordered products, or products modified to a Customer's requirements, or products which would be unsaleable by us to another party, will be accepted for credit.

### 9. Confidentiality

All written instructions, drawings, designs, specifications, manuals and other information which we supply in connection with a quotation or order are confidential. They remain our property and must not be disclosed to any third person or used in any manner whatsoever whether in complete form or in any way adapting or altering it without our written permission and the Customer accepts that any such disclosure is likely to cause damage to our business which we will be entitled to recover from the Customer.

### 10. Variations to Work

- (a) The Customer may request changes by way of extra work beyond that specified in the contract created by the Purchase Order or any quotation by us, including additions to or deletions from the goods originally ordered or in the specifications or drawings relating to those goods. If any such change causes an increase or decrease in the cost or alters the time required for our performance and delivery hereunder, then an equitable adjustment shall be made in the price or performance timetable. We are entitled to charge for any changes at the normal rates applied by us at the time when such change or variation is requested.
- (b) Nothing contained herein compels us to proceed with the change prior to negotiation of any adjustment with us.
- (c) All changes must be agreed in writing.
- (d) In the event of the suspension or cancellation of the work by the Customer's instructions or lack of instructions, then we are entitled to increase the contract price to cover any extra expense thereby incurred and delivery date revised.

### 11. On Site Installation

- 11.1 The Customer indemnifies us against all costs, expenses, losses and damage which may be sustained by us and against all claims and demands made against us in respect of any injury or damage to persons or property which may be caused by the need for us to attend on installation at premises or equipment nominated by the Customer.
- 11.2 Installation of goods by us does not in any way postpone the passing of risk in the goods affected.

### 12. Intellectual and Industrial Property Rights

- 12.1 If goods supplied by us to the Customer's design, instructions or specifications infringe or are alleged to infringe any patent or registered design rights or copyright the Customer will indemnify us against all damages and costs incurred by us as a result of the infringement or allegation. The Customer will provide to us every assistance in meeting an infringement claim brought against us.
- 12.2 The Customer shall also indemnify us against any other damages, costs or expenses in respect of which we may be liable by following such designs, instructions or specifications.

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12.3 We retain all intellectual property in any original design and/or process incorporated in the goods.

### 13. Personal Property Securities Act 1999 (PPSA)

13.1 The Customer acknowledges and agrees that:

- (a) by assenting to these Terms, the Customer grants a security interest to us in all Goods previously supplied by us to the Customer (if any) and all after acquired goods supplied by us to the Customer (or for Customer's account); and
- (b) these terms and conditions shall apply notwithstanding anything express or implied to the contrary contained in the Customer's Purchase Order.

13.2 The Customer undertakes to:

- (a) sign any further documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) which we may reasonably require to enable registration of a financing statement or financing change statement on the Personal Property Securities Register;
- (b) not register a financing change statement or a change demand in respect of the goods as those terms are described in the PPSA without our prior written consent;
- (c) give us not less than 14 days prior written notice of any proposed change in the Customer's name and/or any other changes in the Customer's details (including to but not limited to changes in the Customer's address, facsimile number, trading name or business practice).

- 13.3
- (a) Unless otherwise agreed in writing by us the Customer waives the right to receive a verification statement in respect of any financing statement or financing change statement relating to the security interest.
  - (b) To the maximum extent permitted by law the Customer waives all rights and with our agreement contracts out of Customer's rights under the sections referred to in sections 107(2)(c) to (e) and (g) to (i) of the PPSA.
  - (c) The Customer agrees that nothing in section 114(a), 133 and 134 of the PPSA shall apply to these Terms and with our agreement the Customer contracts out of such sections.
  - (d) The Customer and we agree that section 109(1) of the PPSA is contracted out of in respect of particular goods if and only for as long as we are not the secured party with priority over all other secured parties in respect of those Goods.

### 14. Termination

14.1 This contract may be terminated by us immediately on written notice to the Customer if:

- (a) the Customer defaults in its payments due to us;
- (b) the Customer commits any act of bankruptcy or enters into any composition or arrangement with creditors; or
- (c) where the Customer is a company or incorporation, the Customer does any act which would render it liable to be liquidated or if a resolution is passed or proceedings commenced for the liquidation of the company or incorporation or if a receiver is appointed in respect of all or any of the assets of the company or incorporation.

14.2 Termination of this contract shall not relieve the Customer of its obligations to pay all money owed by it to us on any account whatsoever, which money shall be payable immediately notwithstanding that the date for payment of the money may not have arrived. Termination of this contract shall not relieve the Customer from liability arising from antecedent breach of the terms of this contract.

14.3 Upon termination of this contract for any reason, all rights of the Customer granted under this contract shall terminate and the Customer will not be entitled to receive any rebate or refund of the whole or any part of the money paid by it pursuant to this contract.

### 15. Force Majeure

We shall not be liable for any delay in the production or delivery of the goods directly or indirectly caused by force majeure which term is to include: acts of god, fire, riot, war, embargo, strikes, labour disputes, theft, delays in delivery by sub-suppliers, prohibition of export or import, confiscation, action or interference by any governmental or other authority or any other occurrences (whether or not similar in nature to those specified above) beyond our control. In such event we shall be entitled to determine the contract on giving reasonable written notice or to make delivery of the goods which the Customer agrees to accept whenever such cause of delay has been remedied.

### 16. Limitation of Damages

- (a) No liquidated damages are payable unless specifically agreed by us in writing.
- (b) The Customer agrees to indemnify and hold us our servants and agents and each of them harmless against all claims, losses or damages arising directly or indirectly out of the Customer's use possession or ownership of the goods or any part thereof.
- (c) We (including our employees, agents and subcontractors) shall not be liable in contract, tort under statute or otherwise for any loss or economic loss howsoever arising which is caused, contributed to, or was attributable to any defects or any negligent act or omission on our behalf or our employees, agents and/or subcontractors except to an amount strictly limited in respect of all goods and services supplied by us whether under this contract or otherwise to a total sum of the value invoiced for the goods and services or to a total sum of \$5,000.00 (whichever is the lesser).

### 17. Recovery of Increased Costs

- (a) Statutory Requirements - Any increase in costs due to a requirement to conform with any Act of Parliament, Order of Council or to any order regulation or by-law made with statutory authority by government departments or by local body or other authorities, introduced since the date of this quotation, shall be to the Customer's account.
- (b) Variation in Taxes of Exchange, Custom or other Duties, Sales Taxes, Insurance and Freight Charges - Imported items per inclusion in this quotation are based on rates of exchange, Customs or other duties, sales taxes, insurance and freight charges ruling at the date of this quotation. Any variation in these rates, taxes and charges up to the date on which payment is made shall be to the Customer's account.

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### 18. Privacy

The Customer acknowledges that the name, contact details and style of its business may be collected and used by us for marketing purposes and that such disclosure to third parties is hereby permitted by the Customer and such consent is given in terms of the Privacy Act 1993.

### 19. Address for Service of Notices

Any notice or demand given by Brightwater Services to the Customer may be served by us posting such notice to the Customer's registered office or place of business as advised by the Customer in its application for credit account facilities, or at its normal place of business.

### 20. Disputes

If at any time any question, dispute or difference whatsoever shall arise between the Customer and us, in relation, or in connection with any contract arising from this quotation either party may give to the other notice in writing of the existence of such question, dispute or difference and in the first instance the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At such time a representative with the authority to agree the matter shall be present. Failing agreement, the same shall thereupon be referred to the arbitration in New Zealand of a person to be mutually agreed upon, or failing agreement, of some person appointed on the application of either party by the President of the Institution of Professional Engineers New Zealand. The submission shall be deemed to be a submission to arbitration within the meaning of the terms of Arbitration Laws in force in New Zealand

### 21. General

- 21.1 Our failure to enforce or exercise, at any time or for any period of time, any term of any contract incorporating these terms and conditions will not constitute, and will not be construed as, a waiver of such term and will in no way affect our right later to enforce or exercise it.
- 21.2 The invalidity or unenforceability of any of these terms and conditions will not affect the enforceability of the remainder of these terms and conditions.
- 21.3 The Customer shall not, in relation to the supply of the goods by us, give or make any undertaking, assertion or representation in relation to the goods without our prior approval in writing and the Customer shall indemnify us against any liability or cost we incur as a result of any breach by the Customer of this provision.
- 21.4 These terms and conditions will in all respects be construed and have effect according to New Zealand law and the parties agree to submit to the jurisdiction of the appropriate New Zealand Courts.
- 21.5 To the extent that they may be applicable sections 6 to 10 inclusive of the Contractual Remedies Act 1979, are hereby expressly excluded and in the event of any liability of whatsoever nature be established against us in any way whatsoever under this Agreement, the Customer's remedies shall be limited to the remedies provided in this Agreement PROVIDED HOWEVER that where this Agreement does not provide for a remedy for the matters referred to in Sections 6 to 10 inclusive of the Contractual Remedies Act 1979, the Customer's sole and exclusive remedy for misrepresentation or repudiation or breach of contract or for any of the other matters to which Sections 6 to 10 inclusive relate shall be damages and such damages shall be limited to the sum of \$100.

### 22. Definitions

In the Agreement, these terms will have the following meaning:

"Goods" means all goods supplied from time to time by us to the Customer provided that:

- (a) where the Goods supplied are Customer's own inventory and all references to Goods in these Terms and Conditions shall be read as references to Inventory; and
- (b) where the Goods supplied are not Inventory and all references to Goods in these Terms shall mean the Goods described in any one or more of the relevant Purchase Order, packing slip or invoice (or its equivalent whatever called) relating to those Goods on that basis that each such document shall be deemed to be incorporated in and form part of these Terms.

"Inventory" has the meaning given to that term in the PPSA.

"PPSA" means the Personal Property Securities Act 1999 as amended from time to time. Unless the context otherwise requires, words and phrases shall have the meanings given to them in or by virtue of the PPSA.