

# Brightwater Engineering

---

Standard Terms and Conditions of Sale

## STANDARD TERMS AND CONDITIONS OF SALE

Page 1 of 5

### 1. Incorporation

- 1.1 These terms and conditions (this "contract") between Brightwater Engineers Limited or nominee (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 the terms and conditions of this contract.
- 1.3 Notwithstanding any term or condition to the contrary in the Customer's documents, the terms and conditions of this contract shall supersede any terms in the Customer's documents, including any purchase order, specification, or otherwise, unless expressly agreed in writing between us and the Customer as an amendment to this contract.

### 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 Unless otherwise specified, all prices are specified in New Zealand Dollars and any payments shall be in New Zealand dollars and payable in any manner nominated by us.
- 2.8 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 20<sup>th</sup> of the 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 20<sup>th</sup> of the 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,
  - (a) we are entitled to cancel or withhold supply of further Goods; and
  - (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; and
  - (c) we may charge interest on monies overdue charged on a daily rate calculated by reference to the current BNZ overdraft rates plus 5% per annum and we are also entitled to recover any other costs we incur including solicitor's fees in recovery of any monies the Customer owes to us.
- 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 and Personal Property Securities Act 1999 (PPSA)

- 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 entering this contract the Customer grants a security interest to us in all present and after acquired Goods that we supply and their proceeds (including all previously supplied goods).
- 4.3 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 PPSA;
  - (b) to keep full and complete records of the Goods until payment in full;
  - (c) 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-fulfilment of any other obligation of the Customer under these terms, without prejudice to our other rights and remedies;
  - (d) 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;
  - (e) 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;
  - (f) to keep the Goods free and clear of all liens, claims, taxes, duties, charges, pledges, encumbrances, or adverse claims of any nature;
  - (g) that it will not register or allow any person to register a financing change statement or a change demand in respect of the Goods without our prior written consent;



## STANDARD TERMS AND CONDITIONS OF SALE

Page 2 of 5

- (h) 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;
  - (i) 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;
  - (j) 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;
  - (k) 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; and
  - (l) nothing in section 114(a), 133 and 134 of the PPSA shall apply to this contract and with our agreement the Customer contracts out of such sections.
- 4.4 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.
- 4.5 Terms defined in the PPSA have the same meaning in these terms and conditions.
- 4.6 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.
- 4.7 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.
- 4.8 Goods may be delivered in instalments 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 instalments shall not cancel or repudiate the contract.
- 4.9 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. The Customer agrees that, 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. 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.
- 4.10 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.
- 4.11 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 despatch 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 receipt of the Goods.
- 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.



## STANDARD TERMS AND CONDITIONS OF SALE

Page 3 of 5

### 6. Warranty

- 6.1 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 We do not warrant any parts not of our manufacture that are incorporated in our Goods or sold by us. Any warranty on such parts shall be limited to any warranty supplied by the manufacturer, if any.
- 6.5 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 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.
- 6.6 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.
- 6.7 Notwithstanding any warranty claim, the Customer remains liable to pay the full price of any order.
- 6.8 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.
- 6.9 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 and all costs that we are legally obliged to incur as at 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. All 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, are provided on a final sale basis and returns of these Goods will not be accepted.

### 9. Confidentiality

- 9.1 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 disclosure of such information is likely to cause damage to our business which we will be entitled to recover from the Customer.
- 9.2 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 disclosure of such information to third parties is hereby permitted by the Customer and consent is given in terms of the Privacy Act 1993.

### 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) The Customer is to provide all changes to us in writing and any change shall be agreed by us before proceeding. The fact that the Customer has not provided a change request to us in writing shall not prevent the request from being a valid change request under this contract and we are entitled to recover the full amount of all work we perform pursuant to any change request.



## STANDARD TERMS AND CONDITIONS OF SALE

Page 4 of 5

- (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 and holds us harmless 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 arise as a result of us performing installation at the Customer's premises or on any equipment nominated by the Customer.
- 11.2 Installation of Goods by us does not in any way affect the passing of risk in the Goods in accordance with this contract.

### 12. Intellectual and Industrial Property Rights

- 12.1 Where the Customer provides any designs or other intellectual property they warrant the accuracy of those designs and or other intellectual property. We shall be entitled to rely on and use all designs or other intellectual property provided by the Customer and any reliance or use shall not breach the intellectual property rights of any third party.
- 12.2 If Goods supplied by us to the Customer's design, instructions or specifications infringe or are alleged to infringe any intellectual property, including any patent or registered design rights or copyright, the Customer will indemnify and hold us harmless 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.
- 12.3 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.
- 12.4 We retain all intellectual property in any original design and/or process incorporated in the Goods.
- 12.5 We hereby grant the Customer, and the Customer hereby grants us, an unrestricted royalty-free license in perpetuity to use intellectual property incorporated in the Goods for the purpose of this order.

### 13. Termination

- 13.1 We may terminate this contract without reason by giving no less than 1 months' notice under this clause, in writing, to the Customer. The Customer shall reimburse us for all costs and expenses we incur, or are legally obliged to incur, in fulfilling the order up to and including the date of termination. Upon giving notice, we will take reasonable steps to minimise any further costs and expenses.
- 13.2 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) where we have reasonable reason to believe the Customer will be unable to pay debts as they fall due; or
  - (c) the Customer fails to carry out any of its obligations under this contract.
- 13.3 Termination of this contract shall not relieve the Customer of its obligations 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 shall 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.
- 13.4 Termination of this contract shall not relieve the Customer from liability arising from antecedent breach of the terms of this contract.
- 13.5 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.

### 14. 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, earthquake, 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 terminate the contract in accordance with clause 13 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.

### 15. Limitation of Damages

- 15.1 No liquidated damages are payable unless specifically agreed by us in writing.
- 15.2 Our total liability to the Customer and any other party under all circumstances (including liability under contract, tort, equity or statute) shall be limited to an amount equivalent to \$5,000 or the amount that the Customer has paid for Goods or services under this contract (whichever is lessor). For the avoidance of doubt the limitation under this clause 15.2 shall apply to any:
  - (a) costs, losses or damages howsoever arising whether direct or indirect, consequential or economic;
  - (b) claim for loss of profit, revenue, production or reputation;
  - (c) costs, losses or damages that may arise as a result of any advice given by us to the Customer or any other party in relation to the type of Goods or services; and
  - (d) misrepresentation, repudiation, or breach of contract and for the purposes of sections 35 – 49 of the Contract and Commercial Law Act 2017.
- 15.3 The Customer agrees to indemnify and hold us (including our servants and agents and each of them) harmless against any loss, damage, liability or costs that we incur or may incur to any party as a result of us performing this contract that exceeds the amount in 15.2



## STANDARD TERMS AND CONDITIONS OF SALE

Page 5 of 5

15.4 Our liability 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 the Customer (including the Customer's employees or agents).

### 16. 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 of 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.

### 17. Address for Service of Notices

Any notice or demand given by us 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.

### 18. Disputes

- 18.1 If there is any question, dispute, or difference between the Customer and us at any time, in relation to, or in connection with any contract arising from this quotation, either party must give notice in writing to the other of the existence of such question, dispute, or difference. That notice must include sufficient details to allow the other party to understand the question, dispute of difference.
- 18.2 The parties shall 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 18.1. A representative with sufficient authority shall be present at any meeting between the parties.
- 18.3 If the parties fail to resolve the dispute within 20 working days after notice has been provided under clause 19.1, then either party may by notice require that the matter in dispute be referred to arbitration to be determined by a sole arbitrator.
- 18.4 The parties will attempt to agree an arbitrator. If the parties cannot agree upon the arbitrator within 10 working days of the dispute having been referred to arbitration, the arbitrator shall be nominated upon application of either party by the President of the Arbitrators and Mediators Institute of New Zealand. The seat of the arbitration shall be New Zealand, the laws of New Zealand and the Arbitration Act 1996 shall apply to any arbitration under this agreement.

### 19. General

- 19.1 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 to enforce or exercise it.
- 19.2 The invalidity or unenforceability of any of these terms and conditions will not affect the enforceability of the remainder of these terms and conditions.
- 19.3 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.
- 19.4 The Customer shall ensure all information or documentation provided to us is complete, accurate, and fit for purpose. We shall be entitled to rely on such information and the Customer shall indemnify us for liability arising from any error, inaccuracy, unfitness for purpose, or incompleteness in such information or documentation.
- 19.5 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.

### 20. Assignment

The Customer must not assign the whole or any part of this contract without our prior written consent, which we shall not unreasonably withhold or delay. The Customer agrees that we can assign any part of this contract at any time by providing the Customer with notice of such in writing.

### 21. 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; and
- (c) where applicable, the term 'Goods' shall extend to the proceeds of Goods.

"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.