



# TERMS & CONDITIONS

## 1. RISK

- 1.1. Delivery occurs at the time possession of the Goods passes to the Customer (or a person nominated by the Customer) from DS Engineering. The risk in Goods supplied passes to the Customer on delivery. Quotation and Acceptance
- 1.2. By instructing DS Engineering to proceed with supplying the Goods and/or Services you are deemed to have accepted the quote and that the supply of the Goods and/or Services shall be subject to these Terms.
- 1.3. Where no quote is provided the price for the Goods and/or Services shall be as per DS Engineering's Schedule of Rates applying at the time of delivery.
- 1.4. Where DS Engineering provides a written quote for Goods and/or Services, the quote shall be valid for a period of 30 calendar days from the date of the quote unless withdrawn by DS Engineering prior to acceptance in writing.

## 2. DELIVERY AND FORCE MAJEURE

- 2.1. Unless the Customer and DS Engineering have agreed in writing to a fixed delivery date, then any time frame for delivery of Goods or completion of Services is approximate only and is not of the essence.
- 2.2. DS Engineering shall not be held liable to the Customer for any defect, loss, damage or delay caused by strike, lockout, damage to or breakdown of plant, government interference, act of war, storm, tempest, fire, flood, riot, explosion, earthquake, delay in supply of materials to DS Engineering, shipping, force majeure or any other cause beyond the control of DS Engineering.

## 3. OWNERSHIP

- 3.1. Ownership of all tools and equipment used by DS Engineering in performing any Services for the Customer shall at all times remain with DS Engineering.
- 3.2. Ownership of Goods produced or supplied by DS Engineering including materials supplied as part of Services provided by DS Engineering ("Goods"), shall not pass to the Customer until DS Engineering receives payment in full and the Customer has performed all its other obligations under these Terms and Conditions of Trade ("Terms").

## 4. DELIVERY AND FORCE MAJEURE

- 4.1. Unless the Customer and DS Engineering have agreed in writing to a fixed delivery date, then any time frame for delivery of Goods or completion of Services is approximate only and is not of the essence.
- 4.2. DS Engineering shall not be held liable to the Customer for any defect, loss, damage or delay caused by strike, lockout, damage to or breakdown of plant, government interference, act of war, storm, tempest, fire, flood, riot, explosion, earthquake, delay in supply of materials to DS Engineering, shipping, force majeure or any other cause beyond the control of DS Engineering.

## 5. WARRANTY

- 5.1. DS Engineering warrants that:
  - a. Services shall be carried out in a good and workmanlike manner;
  - b. Goods supplied and materials used in performing Services shall be fit for the purpose for which they are required, as notified by the Customer to DS Engineering in writing.
- 5.2. DS Engineering may, in its discretion, repair or replace any defective Goods or re-perform any defective Services, or refund the amount of those Goods and/or Services, provided that:
  - a. clause 5.3 has been complied with;
  - b. the Customer must supply the date and number of any invoice relating to the Goods and/or Services; and
  - c. DS Engineering must have a reasonable opportunity to inspect the Goods and/or Services complained of.
- 5.3. Any defects in Goods and/or Services supplied must be notified to DS Engineering in writing within the latter of 14 business days of delivery, or the date on which the defect became or should have become apparent.
- 5.4. DS Engineering shall have no obligation to remedy any damage or defect caused by:
  - a. any wilful act or negligence of the Customer or any other person other than DS Engineering or its signets, employees or subcontractors;
  - b. faulty materials or workmanship other than the work or materials provided by DS Engineering;
  - c. design faults, errors or discrepancies where DS Engineering was not responsible for design;

- d. unintended use of the Goods or failure to maintain the Goods in accordance with the stated Rerecommended instructions or requirements provided by DS Engineering.
- 5.5. Except as set out in these Terms or as provided in any written warranty agreement signed by DS Engineering, any and all conditions, guarantees, warranties or representations which might otherwise be implied by law, trade, custom or otherwise are expressly excluded to the maximum extent permitted by law. In particular, and without limitation:
  - a. all implied terms, conditions and warranties contained in the Contract and Commercial Law Act 2017 are expressly excluded;
  - b. the guarantees contained in the Consumer Guarantees Act 1993 are excluded where the Customer acquires Goods and/or Services from DS Engineering for the purposes of a business in terms of sections 2 and 43 of that Act.
- 5.6. To the extent that the law allows DS Engineering to exclude liability, DS Engineering shall not be liable for any loss or damage or liability of any kind whatsoever (including consequential loss or lost profit or business) whether suffered or incurred by the Customer or another person and whether in contract, or tort (including in negligence), or otherwise and whether such loss or damage arises directly or indirectly from Goods and/or Services provided by DS Engineering to the Customer, except as provided in clause 5.8.
- 5.7. To the extent that DS Engineering is liable for any reason for any loss suffered or liability incurred by the Customer arising from any breach of these Terms or for any other reason, such liability is limited to the lesser of:
  - a. the price (excluding GST) of the particular Goods and/or Service that caused the loss, damage or injury; or
  - b. the cost of completing any necessary repairs / remedial work; or
  - c. the actual loss or damage suffered by the Customer.
- 5.8. DS Engineering may use and integrate the work of contractors or third parties in the performance of the Services. DS Engineering shall under no circumstances be responsible for the performance of a contractor or third party where DS Engineering has been instructed by the Customer to use a contractor or third party. Intellectual Property
- 5.9. All intellectual property (including without limitation copyright, patent and design rights, drawings, documents, data, ideas, procedures and calculations) which arises out of or in the course of the production of the Goods or the

provision of the Services shall be the exclusive property of DS Engineering, unless otherwise agreed in writing.

- 5.10. The Customer shall not enter into an employment agreement or contract for services with any employee or independent contractor engaged by DS Engineering while DS Engineering is supplying Goods and/or Services to the Customer, or for a period of six months following the cessation of the supply of Goods and/or Services by DS Engineering to the Customer.
- 5.11. The Customer acknowledges that if it breaches clause 5.10, DS Engineering will incur losses including diminished production capacity and the cost of recruiting replacement employees and/or independent contractors, and the Customer agrees to pay DS Engineering liquidated damages of \$10,000 in respect of each breach of clause 5.10 ("the prescribed remedy"). The prescribed remedy is in addition to any remedy that DS Engineering is entitled to in respect of any breach of confidence or intellectual property rights, and the prescribed remedy relates solely to the damages DS Engineering will suffer as a result of the loss of its employees and/or independent contractors.
- 5.12. If any Goods and/or Services are to be undertaken based on the Customer's designs or instructions, the Customer warrants that the undertaking of this work by DS Engineering will not cause DS Engineering to infringe any third party's intellectual property rights and the Customer agrees to indemnify DS Engineering against any action taken by a third party against DS Engineering in respect of any such infringement.

## 6. PAYMENT

- 6.1. For Goods and/or Services that are not "construction work" as defined in the Construction Act 2002, payment is due immediately upon receipt of DS Engineering's invoice relating to the Goods and/or Services. If the Customer's credit application has been received and approved by DS Engineering, then payment is due by the 20th day of the month following the date of invoice relating to the Goods and/or Services. DS Engineering will issue invoices monthly for progress claims or upon completion of a job, as applicable. The Customer shall make the payments without set-off or deduction of any kind.
- 6.2. Where the price quoted includes, materials supplied to DS Engineering, DS Engineering shall have the right to an increased costs claim where the prices charged to DS Engineering increase from the price applicable at the date of the quote.
- 6.3. Any claim for increased costs under clause 6.2 shall be supported by written evidence of the

charge to DS Engineering prevailing at the time of the quote and the increased charge to DS Engineering at the time the materials were supplied to DS Engineering.

- 6.4. All invoices issued for Goods and/or Services that are "construction work" as defined in the Construction Contracts Act 2002 shall be issued in the form of a payment claim within the meaning of the Construction Contracts Act 2002, and the Act shall apply.

## **7. DEFAULT**

- 7.1. If payment is not made on the due date, then DS Engineering may:
- charge default interest at the rate of 2.5% per month. The interest will be calculated on a daily basis from the date payment was due until the date payment is received by DS Engineering. Any failure or delay by DS Engineering to charge interest on any unpaid account or to exercise any of its rights will not operate as a waiver of those rights. DS Engineering may apportion payments to outstanding accounts as it sees fit;
  - suspend work; and
  - terminate these Terms and pursue remedies.
- 7.2. The Customer must pay DS Engineering's costs (including legal costs, as between solicitor and client) of, and incidental to, the enforcement or attempted enforcement of DS Engineering's rights, remedies and powers under these Terms.

## **8. PERSONAL PROPERTY SECURITIES ACT 1999 ("PPSA")**

- 8.1. Clause 3.1 above creates a security interest in the Goods. The Customer grants DS Engineering a security interest in the Goods and, all proceeds of the Goods and all of the Customer's present and future rights in relation to the Goods and proceeds.
- 8.2. The Customer shall not grant any other security interest or any lien over Goods that DS Engineering has a security interest in. The Customer agrees to execute any documents, provide all relevant information and cooperate fully with DS Engineering to ensure that DS Engineering has a first-ranking perfected security interest in the Goods, subject to security interests in respect of which a financing statement is registered on the PPSR at the date of the Customer's credit application. DS Engineering may at any reasonable time enter the Customer's premises and properties to uplift Goods that DS Engineering has a security interest in.
- 8.3. The Customer waives any rights it may have under sections 114 (l)(a), 116, 120(2), 121, 125, 126, 127, 129, 131, 133, and 134 of the PPSA. The Customer waives its right to receive a copy

of any verification statement (as that term is defined in the PPSA) but DS Engineering may provide a copy on request. The Customer will give DS Engineering prior written notice of a proposed change of its name or address.

## **9. TERMINATION**

- 9.1. Either party may terminate these Terms with immediate effect if any of the following events occur:
- the relevant party commits acts of bankruptcy or makes an assignment or composition with its creditors. any of the conditions necessary to render the relevant party liable to be put into liquidation.
  - the relevant party is or becomes unable to pay expenses that fall due or is deemed to be unable to pay such debts as that term is defined in section 287 of the Companies Act 1993 (or any successor legislation) or suspends payment to its creditors or ceases or threatens to cease to carry on its business or convenes a meeting of its creditors to propose a compromise with its creditors.
  - if an application to put the relevant party into liquidation is made or advertised or a resolution is passed or proposed to be passed for the liquidation of that party.
  - the relevant party has a receiver or manager or statutory manager, or administrator appointed.
- 9.2. If any of the events in clause 9.1 occur, in addition to any remedies DS Engineering may have at law, DS Engineering may do one or more of the following:
- suspend the account and provision of Goods and/or Services;
  - charge default interest in accordance with clause 7.1
  - enter onto the Customer's premises or other property and repossess any Goods which have not been paid for in full;
  - immediately terminate these Terms.
- 9.3. Any termination is without prejudice to the rights of the parties arising prior to termination.
- 9.4. Nothing in clauses 9.1, 9.2, 9.3 affects the operation of any clauses in these Terms which are expressed or implied to have effect after its termination.

## **10. NOTICE**

- 10.1. Any notice may be given in person, posted or sent by email (or where the Customer is a company, to any of its directors, agents or employees at the Customer's address).
- 10.2. Privacy of Information
- 10.3. The Customer authorises DS Engineering:
- to collect, retain and use information about the Customer from any person for the purpose of assisting its creditworthiness;

- b. to disclose information about the Customer;
- c. to any person who guarantees, or who provides insurance, or who provides any credit support, in relation to the Customer's obligations to DS Engineering;
- d. to such persons as may be necessary or desirable to enable DS Engineering to exercise any power or enforce or attempt to enforce any of its rights, remedies and powers under these Terms.

#### **11. VARIATION**

- 11.1. DS Engineering shall be entitled at any time by notice in writing to vary any provision of these Terms and the Customer shall be bound by such variation.

#### **12. SEVERANCE**

- 12.1. If any of these Terms is held to be invalid, void, unenforceable or illegal for any reason, such provision shall be deemed to be severed from these Terms and the remaining provisions shall continue in force.

#### **13. NO WAIVER**

- 13.1. A failure or delay in enforcing a right pursuant to these Terms is not a waiver of that right. Any waiver must be in writing and signed by the party granting the waiver.

#### **14. ASSIGNMENT**

- 14.1. The Customer must not assign or subcontract any of its rights, powers or obligations under these Terms. Jurisdiction
- 14.2. This Contract shall be governed by the laws of New Zealand and shall be subject to the non-exclusive jurisdiction of New Zealand.

#### **15. INTERPRETATION**

- 15.1. In these Terms:
  - a. words importing the singular include the plural and vice versa.
  - b. references to a party include that party's successors, personal representatives, executors, administrators and permitted assigns,
  - c. references to legislation include as amended, re-enacted or substituted from time to time.