

TERMS AND CONDITIONS OF SUPPLY

1 DEFINITIONS

- 1.1 **Customer** means the person or entity acquiring or ordering Products from ITW.
- 1.2 **ITW** means ITW Construction Systems International a Division of ITW Australia Pty Ltd, ABN 63 004 235 063
- 1.3 **Products** mean all products (including accessories and spare parts), services and equipment supplied or to be supplied by ITW to the Customer.
- 1.4 **Terms and Conditions** means these terms and conditions of sale, as may be amended from time to time by ITW.

2 QUOTATIONS AND ORDERS

- 2.1 Any quotation made by ITW is not an offer to sell Products. Prices quoted by ITW are subject to changes necessary to correct errors and are otherwise valid for a period of 30 days only.
- 2.2 No order for Products is binding on ITW until ITW accepts it. ITW's acceptance of an order and these Terms and Conditions alone will constitute the entire agreement of the parties (**Contract**) in relation to the supply of Products and may only be varied in writing, signed by the parties.
- 2.3 The Contract sets out the entire agreement and understanding between ITW and Customer in respect of the relevant Products and supersedes all prior agreements, understandings, representations and warranties (whether express or implied). ITW is not bound by any terms or conditions in any document issued by a Customer.
- 2.4 No order may be cancelled after acceptance by ITW without ITW's consent. The Customer indemnifies ITW in respect of all direct and indirect costs, expenses and losses incurred as a result of the cancellation of an order.

3 PRICES

- 3.1 Unless otherwise agreed by ITW in writing, the price to be paid by the Customer for Products will be: (a) ITW's then prevailing price for the supply of such Products to the Customer; and (b) any applicable taxes or charges (including any goods and services or similar taxes) levied by any governmental authority upon the supply or use of the Products.
- 3.2 Unless otherwise specified, prices do not include transportation costs and are exclusive of goods and services tax. Products are supplied ex-works.
- 3.3 If: (a) a raw material, component, or service provider raises its prices, or imposes a surcharge on ITW; or (b) any tax is imposed or increased in connection with the supply of any Products by ITW (including any carbon or emissions related tax); or (c) ITW otherwise incurs an increase in costs in supplying Products to the Customer, ITW reserves the right to increase applicable prices and the Customer agrees to accept such price increase.

4 PAYMENT

Payment for Products must be made by the Customer to ITW within 30 days from the end of the month following the month of invoice for those Products. Payment must be in a form acceptable to ITW and without any deduction, withholding, set-off or counter claim of any nature.

5 DELIVERY

- 5.1 ITW will make all reasonable efforts to deliver the Products to the Customer on the date(s) applicable under a Contract, but shall be under no obligation or liability to the Customer for failing to do so.
- 5.2 Delivery shall be effected upon:
 - (a) Physical delivery of the Products to the address requested by the Customer; or
 - (b) Pick up by Customer; or
 - (c) Physical delivery to the Customer's nominated carrier.
- 5.3 Notation by ITW's carrier on the delivery docket shall be conclusive evidence of delivery. The Customer shall be responsible for any loss or damage occurring during unloading of the Products at the Customer's premises.
- 5.4 If the Customer refuses to accept delivery of Products then the risk in the Products shall pass to the Customer from the time of such refusal. In such event, ITW may (without limiting any of its other rights) arrange to store the Products at the Customer's expense.

6 TITLE AND RISK

- 6.1 Title in and to all Products delivered to the Customer will remain with ITW and will not pass to the Customer until such time as the Products have been paid for in full.
- 6.2 Risk in and to Products will pass to the Customer upon delivery of the Products to the Customer.
- 6.3 Until ITW has received payment in full for Products:
 - (a) the Customer holds the Products as bailee for ITW;
 - (b) The Customer shall safely and securely store the Products separately from the other goods on the premises of the Customer in such a manner as to show clearly that the Products are the property of ITW;
 - (c) ITW has a security interest in the Products;
 - (d) The Customer shall, upon request from ITW, deliver up such Products to ITW (or as directed by ITW);
 - (e) Representatives of ITW will be entitled and permitted at any time to enter any place where the Products are situated to repossess the Products, and to remove the Products from any vessel or vehicle, and for this purpose ITW is hereby appointed as the Customer's agent. The Customer agrees to indemnify ITW and keep ITW indemnified against all costs incurred by ITW in removing the Products and against losses, and liabilities incurred by, and any claims against, ITW in removing the Products and arising from such removal; and
 - (f) If the Products in part or in full are mixed with the Products that have been paid for, the Customer bears the onus of proving that the Products in its possession (whether mixed with other goods or not) have been paid for in full by the Customer. If the Customer is unable to prove, to the satisfaction of ITW that the goods identified as ITW goods have been paid for in full, then those goods shall be deemed to relate to unpaid invoices outstanding from time to time and are deemed to be the property of ITW. ITW reserves the right to repossess those goods without having to prove that the goods relate to specific unpaid invoices outstanding at the time of repossession.

7 SECURITY INTEREST

- 7.1 ITW and the Customer acknowledge that following the commencement of the *Personal Property Securities Act 2009* (Cth) (**PPSA**), the following provisions will apply to this agreement. Unless otherwise stated, a term contained in these Terms and Conditions that is defined in the PPSA (but not otherwise defined in these Terms and Conditions) has the meaning given to it in the PPSA.
- 7.2 In consideration for ITW supplying Products to the Customer under these Terms and Conditions, the Customer:
 - (a) agrees to treat the security interest created under these Terms and Conditions as a continuing and subsisting security interest in the relevant Products with priority over any registered or unregistered general (or other) security and any unsecured creditor (even if the Products become fixtures before paid for in full);

- (b) grants to ITW a purchase money security interest (**PMSI**);
 - (c) agrees that the PMSI granted herein will continue to apply to any goods coming into existence or proceeds of sale of Products or goods coming into existence;
 - (d) agrees that the PMSI has attached to all Products now or in the future supplied to the Customer by ITW; and
 - (e) agrees, until title in the Products pass to it, to keep all Products free and ensure all Products are kept free of any charge, lien or security interest except as created under these Terms and Conditions, and not otherwise deal with Products in a way that will or may prejudice any rights of ITW under these Terms and Conditions or the PPSA.
- 7.3** ITW reserves the right to register a financing statement under the PPSA in respect of the Products. Costs of registering a financing statement (or a financing change statement) will be paid by the Customer.
- 7.4** The Customer waives its right to receive a copy of any financing statement, financing change statement or verification statement that is or may be registered, issued or received at any time.
- 7.5** The Customer irrevocably grants ITW the right to enter any premises or property (without notice) and without being in any way liable to ITW or any other person if the Customer has cause to exercise any of its rights under the PPSA (and the Customer will indemnify ITW against any such liability).
- 7.6** It is agreed that the Customer hereby waives its rights under the following sections of the PPSA: section 95 (notice of removal of an accession) to the extent that it requires the secured party to give a notice to the grantor; section 96 (when a grantor may retain an accession); section 123 (right to seize collateral); section 125 (obligation to dispose of or retain collateral); section 126 (apparent possession); section 128 (secured party may dispose of collateral); section 129 (disposal by purchase); section 130 (notice of disposal) to the extent that it requires the secured party to give notice to the grantor; paragraph 132(3)(d) (contents of statement of account after disposal); subsection 132(4) (statement of account if no disposal); subsection 134(1) (retention of collateral); section 135 (notice of retention); section 142 (redemption of collateral); and section 143 (reinstatement of security agreement).

8 BREACH AND INSOLVENCY

If:

- (a) the Customer fails to comply strictly with the terms of a Contract;
- (b) an application or order is made, a resolution is made or proposed or other steps are taken for the winding up, dissolution, official management or voluntary administration of the Customer (other than a voluntary liquidation for the purpose of amalgamation or reconstruction); or
- (c) the Customer enters into any arrangement, compromise or composition or assignment for the benefits of its creditors or any class of them;
- (d) a receiver, a receiver and manager, administrator or other officer is appointed to the Customer or any part of its property, or a third party attempts to levy execution against the Customer's property or the goods;
- (e) the Customer ceases, suspends or threatens to cease or suspend the conduct of its business or disposes of or threatens to dispose of its assets other than in the ordinary course of business;
- (f) the Customer is or is deemed (including under any applicable law) unable to pay its debts as and when they fall due, or stops or suspends the payments of its debts;
- (g) in the case of the Customer being a natural person, the Customer commits an act of bankruptcy; or
- (h) ITW is of the view, acting reasonably, that any of the above will or are likely to occur,

ITW may (without limiting or otherwise prejudicing any other rights it may have) at any time terminate any and all Contracts between ITW and the Customer and refuse to supply any and all Products to the Customer. The Customer agrees to indemnify ITW (and keep ITW indemnified) against loss, cost or expense and other liability (including but not only legal expenses of any nature and payable to or on behalf of any person) suffered or incurred by ITW in connection with any breach of a Contract by the Customer.

9 CUSTOMER WARRANTIES

9.1 The Customer:

- (a) warrants to ITW that it has read and understood these Terms and Conditions;
- (b) warrants to ITW that all information supplied by or on behalf of it to ITW in connection with the supply of Products is true and accurate and not misleading;
- (c) warrants that it has not relied on any representation or statement made by or on behalf of ITW in connection with the supply of Products that has not been clearly and expressly stated in the Contract;
- (d) acknowledges that ITW has relied on the information supplied by or on behalf of the Customer to it in supplying the Products; and
- (e) warrants that the supply of the Products by ITW to the Customer, and the use of Products by the Customer, will not make ITW liable to any prosecution, claim or other action under any applicable law.

9.2 The Customer indemnifies ITW and holds ITW harmless against all fines, penalties, damages, loss, costs or expenses (including but not only legal expenses of any nature and payable to or on behalf of any person) suffered or incurred by ITW in connection with any breach of the warranties of the Customer set out in these Terms and Conditions.

9.3 Without limiting the liability of the Customer under the indemnity above, ITW may at its sole discretion by itself or in conjunction with the Customer defend, settle or compound any action, suit, proceeding, claim or demand brought or made against it by any person in connection with any breach of the warranties given by the Customer under these Terms and Conditions and the Customer agrees that the indemnity extends to any cost or expense incurred by ITW in conducting that defence or in settling or compounding the action, suit, proceeding, claim or demand.

9.4 ITW reserves the right to refuse to do or to omit to do anything, or to refuse to comply with any request or direction of the Customer, which in the reasonable opinion of ITW would constitute or result in a breach of any warranty given by the Customer under these Terms and Conditions or a breach by the Customer of a Contract.

10 INTELLECTUAL PROPERTY

10.1 All drawings, know-how, designs, specifications, inventions, devices, developments, processes, copyrights and other information or industrial or intellectual property disclosed or otherwise provided to the Customer by ITW or otherwise subsisting in the Products and all rights therein (collectively **Intellectual Property**) will remain the property of ITW and will be kept confidential by the Customer. The Customer shall have no claim to, nor ownership interest in, any Intellectual Property. The Customer acknowledges that no license or rights of any sort are granted to the Customer in respect of any Intellectual Property, other than the limited right to use Products purchased from ITW for the purpose they are supplied by ITW.

10.2 The Customer warrants that any Products manufactured, constructed or supplied by ITW which are based in whole or in part upon designs, drawings, specifications or information supplied to ITW by or on behalf of the Customer shall not infringe any letters, patents or registered designs or any other industrial or intellectual property rights of any person.

11 CONFIDENTIAL INFORMATION

11.1 All information furnished or made available by ITW to the Customer in connection with the subject matter of these Terms and Conditions or the supply of Products shall be held in the strictest confidence by the Customer. The Customer agrees not to use such information or disclose such information to others without ITW's prior written consent. The obligations in this paragraph will not apply to any information which:

- (a) at the time of disclosure was or thereafter becomes, generally available to the public by publication or otherwise through no breach by the Customer of any obligation herein;
- (b) the Customer can show by written records was in the Customer's possession prior to disclosure by ITW; or
- (c) is legally made available to the Customer by or through a third party having no direct or indirect confidentiality obligation to ITW with respect to such information.

12 CLAIMS AND RETURNS

- (a) Examination of the Products shall be made by or on behalf of the Customer, and unless within 7 business days of delivery of the Products, the Customer gives written notice that the Products do not comply with the applicable Contract, the Products shall be deemed to have been in all respects supplied in accordance with the relevant Contract, and the Customer shall be bound to accept and pay for the Products accordingly.
- (b) Claims by the Customer in respect of Products which have not been supplied in accordance with the relevant Contract will only be considered by ITW if: (a) the claim is made within 7 business days of the date of delivery of the Products; (b) representatives of ITW have been afforded a reasonable opportunity to inspect the Products; and (c) the Products are subsequently returned to ITW as directed by ITW.
- (c) ITW is not obliged to accept any return of Products that have been supplied (or are deemed to have been supplied) in accordance with the relevant Contract. Even if ITW determines that it will accept a return of Products in those circumstances: (a) ITW is not obliged to accept any Products which have been used, damaged or altered in any way; (b) all Products must be returned in their original packaging; (c) Products returned will be subject to a rehandling charge of 20% of the invoice and (d) Products are to be returned at the Customer's expense.

13 LIMITATION OF LIABILITY

- 13.1 Except as expressly provided to the contrary in writing in a Contract: (a) ITW gives and makes no warranty in respect of the Products; and (b) all conditions and warranties implied at law (whether by statute, common law, equity or otherwise) are (to the extent permitted by law) expressly excluded from the Contract.
- 13.2 If any statute implies any term, condition or warranty into a Contract, and that statute prohibits provisions in a contract excluding or modifying the application of, exercise of, or liability under, such a term, condition or warranty, then that term, condition or warranty will be taken to be included in the Contract. However, the liability of ITW for any breach of such a term, condition or warranty will be limited, if permitted by the statute, at the option of ITW, to any one or more of the following:
- (a) if the breach relates to goods:
 - (i) the replacement of the goods, the supply of equivalent goods or the repair of the goods; or
 - (ii) to the extent required by the relevant statute, the payment of the cost of replacing the goods or of acquiring equivalent goods or the cost of having the goods repaired; and
 - (b) if the breach relates to services:
 - (i) the supplying of the services again; or
 - (ii) to the extent required by the relevant statute, the payment of the cost of having the services supplied again.

13.3 ITW will not be responsible for any failure to supply Products on the date agreed between the parties and the Customer is not entitled to cancel any order as a result of that failure.

13.4 To the extent permitted by law, and except as otherwise expressly agreed in writing as part of a Contract, ITW will not be liable for any personal injury, incidental damages, consequential losses, loss of profit, costs of business interruption, loss of opportunities or any other loss, damage, cost, expense or liability whatsoever arising from any use of, or incidental to, the Products or their use, or arising out of ITW's negligence or breach of a Contract.

14 EXCUSABLE DELAYS

- (a) ITW shall not be liable for any failure to comply with a Contract when such failure is caused by or arises out of any of the following: (a) fire, storm, tempest, earthquake, inevitable accident or other act of God; (b) any act of public enemy; (c) any act of any government or any government authority or instrumentality; (d) any act of any person engaged in subversive activity or sabotage; (e) epidemics or quarantine restrictions; (f) strikes, slow-downs, lockouts or labour stoppages or disputes of any kind or freight embargoes; (g) any shortfall, delay or failure to supply by any of ITW's suppliers; or (h) any other cause or event whatsoever which is beyond the control and without the fault or negligence of ITW.
- (b) In the event of a failure by ITW to comply with a Contract, unless ITW advises the Customer that it is able to make alternative arrangements, the Customer shall be entitled to obtain the Products contracted for supply elsewhere for the duration of such failure

15 GOVERNING LAW

These Terms and Conditions are governed by and construed in accordance with the laws of the State of Victoria, Australia (regardless of the place in which the Products are to be delivered). The Customer submits to the jurisdiction of the courts of the State of Victoria and of the courts competent to hear appeals from the courts of that State.

16 ACCEPTANCE

- (a) The Customer declares that the information provided by it in support of or in connection with the Contract is true and correct and not misleading.
- (b) The Customer agrees to be bound solely by the Contract and further agrees that any terms or conditions of purchase that may be incorporated in any order, acceptance of quotation or other document issued by the Customer shall, unless expressly agreed to in writing by ITW's duly authorised representative, have no legal force or effect.
- (c) The Customer agrees that any legal costs incurred by ITW (on a solicitor and own client basis) in the recovery of any monies due by the Customer shall be recoverable in full from the Customer.
- (d) The Customer acknowledges that these Terms and Conditions are also available via the website www.itwcs.com.au and can change without notice.
- (e) The Customer accepts these Terms and Conditions by placing an order for Products with ITW