

TERMS & CONDITIONS OF TRADE

1. Definitions

- 1.1 “Company” shall mean Utilise Phil Limited T/A Utilise Phil its successors and assigns or any person acting on behalf of and with the authority of Utilise Phil Limited T/A Utilise Phil.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Company to the Client.
- 1.3 “Guarantor” shall mean that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Goods” shall mean Goods supplied by the Company to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and includes Goods described on any invoices, quotation, work authorisation or any other forms as provided by the Company to the Client.
- 1.5 “Services” shall mean all services supplied by the Company to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 “Price” shall mean the price payable for the Goods as agreed between the Company and the Client in accordance with clause 3 of this contract.

2. Terms and Conditions of Trade

- 2.1 These Terms and Conditions of Trade and any subsequent terms and conditions issued by the Company shall apply to all orders for the Goods/Services made by the Client after the date and time at which these conditions are first delivered or sent by email or in writing of any description to, or otherwise brought to the notice of, any employee, staff member or representative of the Client.
- 2.2 It shall be the Client’s responsibility to ensure that these conditions are promptly brought to the attention of the appropriate staff of the Client and accordingly any order made by the Client after the date and time described above in this clause shall be deemed to be an acceptance of these conditions.

3. Acceptance

- 3.1 Any instructions received from the Client for the supply of Goods and services supplied by the Company shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.

- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Company.
- 3.4 The Client shall give the Company not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Company as a result of the Client's failure to comply with this clause.

4. Price, Payment and Late Payment

- 4.1 At the Company's sole discretion, the Price shall be either:
- (a) the Company's current price at the date of delivery of the Goods according to the Company's current Price list; or
 - (b) the Company's quoted Price (subject to clause 4.2) which shall be binding upon the Company provided that the Client shall accept the Company's quotation in writing within thirty (30) days.
- 4.2 The Company reserves the right to change the Price in the event of a variation to the Company's quotation. Any variation from the Company's quoted Price will be detailed in writing and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 At the Company's sole discretion, a deposit may be required.
- 4.4 At the Company's sole discretion:
- (a) payment shall be due on delivery of the Goods; or
 - (b) payment shall be due before delivery of the Goods.
- 4.5 Payment is due seven (7) days from date of Invoice, unless otherwise stated.
- 4.6 The Price (unless otherwise stated in writing) does not include the costs of supply or installation of any electrical and/or building and landscaping materials or any other ancillary equipment that may be required to complete the work that was outside of the initial scope of work.
- 4.7 In the event that any hire machinery is needed to install the Goods, any costs associated with the hireage or supply of such equipment shall be in addition to the Company's quoted Price.
- 4.8 Removal of any existing machinery or fixtures necessary to install the Goods is in addition to the Company's quoted Price.
- 4.9 Payment will be made by cash, or by bank cheque, or by direct credit, or by credit card or by any other method as agreed to between the Client and the Company.
- 4.10 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 4.11 Credit Card Surcharge fee 3.30% is payable on Invoice total amount owing. The fee will be added at time of payment.

- 4.12 Late payment shall incur interest at the rate of 10% per annum calculated on a daily basis. This shall be payable on any monies outstanding under these terms and conditions from the date payment was due until the date payment is received by the Company, but without prejudice to the Company's other rights or remedies in respect of the Client's default in failing to make payment on the due date.
- 4.13 If any account remains overdue after thirty (30) days then an amount of the greater of fifty dollars (\$50.00) or ten percent (10%) of the amount overdue (up to a maximum of three hundred and fifty dollars (\$350.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 4.13 Without prejudice to any other remedies the Company may have, if at any time the Client is in breach of any obligation (including those relating to payment); the Company may suspend or terminate the supply of Goods and/or services to the Client and any of its other obligations under the terms and conditions. The Company will not be liable to the Client for any loss or damage the Client suffers because the Company exercised its rights under this clause.
- 4.14 **In the event that:**
- 4.14.1 any money payable to the Company becomes overdue, or in the Company's opinion the Client will be unable to meet its payments as they fall due; or
- 4.14.2 the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- 4.14.3 a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client; then without prejudice to the Company's other remedies at law
- 4.14.4 the Company shall be entitled to terminate all or any part of any Goods/Service that they provided to the Client that remains unperformed in addition to and without prejudice to any other remedies; and all amounts owing to the Company shall, whether or not due for payment, immediately become payable, inclusive of any termination fees, and the company shall pass on all additional fees relating to recovering the rest to the Client.
- 4.15 Any expenses, disbursements and /or legal costs incurred by the Company in the enforcement of any rights contained in this agreement shall be paid by the Client, including any reasonable Solicitors fees and/or debt collection agency fees and costs.
- 4.16 Payment allocation: The Company at its discretion shall allocate payments received from the Client towards any invoice the Company determines and may do so at any time of receipt or at any time afterwards and/or upon default by the Client may reallocate any or all payments previously received and allocated. In the absence of any payment allocation by the Company payment shall be deemed to be allocated in such manner as preserves the maximum value of the Companies purchase money security interest in the Goods.

5. Delivery of Goods

- 5.1 At the Company's sole discretion delivery of the Goods shall take place when the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by the Company or the Company's nominated carrier).

- 5.2 At the Company's sole discretion, the costs of delivery is:
- (a) in addition to the Price; or
 - (b) for the Client's account.
- 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then the Company shall be entitled to charge a reasonable fee for redelivery.
- 5.4 Delivery of the Goods to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 5.5 The Company may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.
- 5.6 The Client shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
- (a) such discrepancy in quantity shall not exceed 10%; and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.7 The failure of the Company to deliver shall not entitle either party to treat this contract as repudiated.
- 5.8 The Company shall not be liable for any loss or damage whatsoever due to failure by the Company to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Company.
- 6. Risk**
- 6.1 If the Company retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Company is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Company is sufficient evidence of the Company's rights to receive the insurance proceeds without the need for any person dealing with the Company to make further enquiries.
- 6.3 There are a number of variables that may impact on the performance of the Goods including, but not limited to, the compatibility of the Goods with other equipment that may or may not have been supplied by the Company. Whilst the Company shall make every endeavor to ensure the compatibility of the Goods with other equipment, the Company shall not be liable for any loss or damage resulting from incompatibility.
- 6.4 The Client shall be liable for any loss or damage whatsoever caused in the event that the Goods are fitted, serviced or operated incorrectly, or adapted for use other than the purpose that the Goods were intended for, or any part thereof however arising.

7. Clients Responsibility

- 7.1 The Client shall be solely responsible for any council permits, licenses, and other legal requirements for installation of any goods.
- 7.2 It is the Clients responsibility to ensure that any ancillary devices are capable of withstanding the requirements of the goods to be installed.

8. Title/Ownership

- 8.1 The Company and Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid the Company all amounts owing for the particular Goods; and
 - (b) the Client has met all other obligations due by the Client to the Company in respect of all contracts between the Company and the Client.
- 8.2 Receipt by the Company of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honored, cleared or recognized and until then the Company's ownership or rights in respect of the Goods shall continue.
- 8.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until the Company shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from the Company to the Client the Company may give notice in writing to the Client to return the Goods or any of them to the Company. Upon such notice being given the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Client is only a bailee of the Goods and until such time as the Company has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods on trust for the Company; and
 - (d) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that the Company will be the owner of the end products; and
 - (e) if the Client fails to return the Goods to the Company then the Company or the Company's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Goods are situated as the invitee of the Client and take possession of the Goods, and the Company will not be liable for any reasonable loss or damage suffered as a result of any action by the Company under this clause.

9. Client's Disclaimer

- 9.1 The Client hereby waives any right to rescind, or cancel any contract with the Company or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made

to the Client by the Company and the Client acknowledges that the Goods are bought relying solely upon the Client's skill and judgment.

10. Defects

- 10.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Company of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Company an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Company has agreed in writing that the Client is entitled to reject, the Company's liability is limited to either (at the Company's discretion) replacing the Goods or repairing the Goods.
- 10.2 Goods will not be accepted for return other than in accordance with 10.1 above.

11. Warranty

- 11.1 For Goods not manufactured by the Company, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Company shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 11.2 To the extent permitted by statute, no warranty is given by the Company as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. The Company shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
- 11.3 In the case of second-hand Goods, the Client acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Company as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Company shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

12. Consumer Guarantees Act 1993

- 12.1 If the Client is acquiring Goods for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by the Company to the Client.

13. Security and Charge

- 13.1 Despite anything to the contrary contained herein or any other rights which the Company may have howsoever:

- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several, interest in the said land, realty or any other asset to the Company or the Company's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Company (or the Company's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- (b) should the Company elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Company from and against all the Company's costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Company or the Company's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 15.1.

14. Cancellation

- 14.1 The Company may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice the Company shall repay to the Client any sums paid in respect of the Price. The Company shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 14.2 In the event that the Client cancels delivery of the Goods the Client shall be liable for any loss incurred by the Company (including, but not limited to, any loss of profits) up to the time of cancellation.

15. Privacy Act 1993

- 15.1 The Client and the Guarantor/s (if separate to the Client) authorises the Company to:
 - (a) collect, retain and use any information about the Client and/or Guarantors, for the purpose of assessing the Client's and/or Guarantors creditworthiness or marketing products and services to the Client and/or Guarantors; and
 - (b) disclose information about the Client and/or Guarantors, whether collected by the Company from the Client and/or Guarantors directly or obtained by the Company from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client and/or Guarantors.
- 15.2 Where the Client and/or Guarantors are an individual the authorities under clause 17.1 are authorities or consents for the purposes of the Privacy Act 1993.

- 15.3 The Client and/or Guarantors shall have the right to request the Company for a copy of the information about the Client and/or Guarantors retained by the Company and the right to request the Company to correct any incorrect information about the Client and/or Guarantors held by the Company.

16. Personal Property Securities Act 1999 ("PPSA")

- 16.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:

- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) will be supplied in the future by the Company to the Client.

- 16.2 The Client undertakes to:

- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Company may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, the Company for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
- (c) not register a financing change statement or a change demand without the prior written consent of the Company; and
- (d) immediately advise the Company of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.

- 16.3 The Company and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

- 16.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.

- 16.5 Unless otherwise agreed to in writing by the Company, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.

- 16.6 The Client shall unconditionally ratify any actions taken by the Company under clauses 16.1 to 16.5.

17. Governing Laws

- 17.1 These Terms and Conditions of Trade (TOT) will be interpreted in accordance with applicable government legislation, which will have exclusive legal jurisdiction over any dispute in relation to the products and/or services or these TOT.

18. Dispute Resolution

- 20.1 The Company will endeavour to resolve any dispute between the Client and itself without the need for Court proceedings. Any such attempt is without legal prejudice.
- 20.2 The Company reserves the right to go to the Disputes Tribunal if no resolution can be reached between the parties.

19. General

- 19.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality, and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of New Zealand.
- 19.3 The Company shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Company of these terms and conditions.
- 19.4 In the event of any breach of this contract by the Company the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 19.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Company nor to withhold payment of any invoice because part of that invoice is in dispute.
- 19.6 The Company may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 19.7 The Company reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Company notifies the Client of such change.
- 19.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other events beyond the reasonable control of either party.
- 19.9 The failure by the Company to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Company's right to subsequently enforce that provision.