

to the Buyer, due to a change in design or specifications by the manufacturer of the Goods, the Buyer agrees to accept the Goods as modified.

## POSITION PARTNERS NEW ZEALAND LTD (Company No. 4963339)

### TERMS AND CONDITIONS OF SALE

#### 1. DEFINITIONS

- 1.1 **Buyer** means the party specified as such on the Goods Order form and where the context requires, includes that party's employees agents, representatives, successors and assigns;
- 1.2 **Cancellation Cost** means the costs incurred by the Seller due to the return of Goods by the Buyer which is calculated as a sum equivalent to ten (10) per cent of the Price of the Goods;
- 1.3 **Contract** means the Credit Application, the Terms and Conditions and any Collateral Documents;
- 1.4 **Collateral Documents** means any sale delivery dockets, Goods Order, quotations, invoices, guarantees or other documents which form or describe the subject matter of a Contract entered into in accordance with this Contract, but does not include any descriptions, illustrations and performances contained in catalogues, price lists and advertising material;
- 1.5 **Credit Application** means the document headed "Credit Application Form";
- 1.6 **Delivered or Delivery** means the delivery, at the Buyer's cost, of the Goods by the Seller to the Buyer's nominated address for delivery;
- 1.7 **Event of Default** means the circumstances or actions set out in clause 16(a) to 16(f) of these Terms and Conditions;
- 1.8 **Goods** means any goods or products purchased by the Buyer from the Seller under any contract, agreement or order;
- 1.9 **Goods Order** means the written order given by the Buyer to the Seller to which these Terms and Conditions of sale are attached and form part of, specifying the type and quantity of Goods to be purchased by the Buyer;
- 1.10 **GST** means Goods and Services Tax pursuant to the Goods and Services Tax Act 1985;
- 1.11 **Guarantor** means the person or persons stated in the Credit Application and / or any party who provides a guarantee to the Seller in relation to the Buyer's performance of its obligations in this Contract;
- 1.12 **Seller** means the party as such specified on the Goods Order form to which these Terms and Conditions of sale are attached;
- 1.13 **Terms and Conditions** means these Terms and Conditions.

#### 2. ACKNOWLEDGEMENT

- 2.1 The Buyer acknowledges and agrees that these Terms and Conditions of sale form an integral part of all Goods Orders and Collateral Documents involving the sale of Goods by the Seller to the Buyer unless the Seller and the Buyer agree in writing to separate or varied terms and conditions of sale.
- 2.2 This Contract constitutes the entire Contract between the Seller and the Buyer and no other Contracts or understandings shall affect the relationship between the parties unless agreed to in writing by the Seller.
- 2.3 The Seller, in its absolute discretion and without incurring any liability to the Buyer, may:
  - (a) cease or suspend supply of the Goods under this Contract; and / or
  - (b) subject to clause 2.1, amend this Contract.
- 2.4 If an Event of Default occurs, all monies then outstanding to the Seller become immediately due and payable and the Seller may, without prejudice to its rights under this Contract, and its rights generally, call up all monies owing to it by the Buyer, retain all monies paid on account and / or cease further supply.

#### 3. PRICE

- 3.1 The price of the Goods purchased by the Buyer shall be the Seller's price for the Goods applicable on the date the Goods Order is accepted by the Seller in writing, unless otherwise agreed in writing between the Buyer and the Seller.
- 3.2 The Seller may by notice in writing to the Buyer vary the price of the Goods at any time prior to Delivery of the Goods. Within two (2) days of the giving of such notice, the Buyer may cancel any Goods ordered but not yet delivered by notice in writing to the Seller to that effect, otherwise the Buyer is deemed to have accepted the Seller's new price for the Goods.
- 3.3 The Seller will issue a tax invoice for the Goods purchased by the Buyer specifying the price for the Goods as determined in accordance with clause 3.1 or 3.2 and the cost of Delivery of the Goods.
- 3.4 If the Buyer cancels an order for Goods after the delivery of the Goods to the Buyer, upon return of the Goods to (such delivery of the Goods, to be at the cost of the Buyer), the Seller will be entitled to deduct the Cancellation Cost from any credit raised in favour of the Buyer. If no credit is raised in favour of the Buyer, the Seller will be entitled to recover the Cancellation Cost from the Buyer as a liquidated debt.
- 3.5 The price of the Goods is exclusive of GST. GST is payable on the price of the Goods.

#### 4. TRADE-INS

- 4.1 The Buyer may trade-in any goods as part payment for Goods purchased by the Buyer, only if:
  - (a) the Seller agrees, in its absolute discretion, to accept the goods as a trade-in;
  - (b) the Seller agrees to the price to be paid by the Seller for the goods to be traded-in, which price shall be a set-off against the amount payable by the Buyer for the Goods purchased by the Buyer.
- 4.2 In relation to any goods traded-in by the Buyer under clause 4.1, the Buyer:
  - (a) warrants that:
  - (b) it has absolute right, title and interest in the goods to be traded-in; or the goods are free of every liability and encumbrance attaching to the goods to be traded-in; and
  - (c) must provide documentary evidence of the trade-in goods being free of all encumbrances to the Seller, on or before the trade-in of the goods, in a form acceptable to the Seller in its absolute discretion, which in the case of the Buyer being a company must include evidence that the goods to be traded-in are not subject to, or have been released from, any charge, lien and / or security interest.
- 4.3 The Buyer acknowledges and agrees that the Seller has no obligation to Deliver any Goods to the Buyer unless and until:
  - (a) the Buyer has complied with clause 4.2 of these Terms and Conditions of sale to the satisfaction of the Seller, in its absolute discretion;
  - (b) the Buyer has delivered the goods to be traded-in to the Seller in a condition which is acceptable to the Seller, in its absolute discretion; and
  - (c) the Seller has notified the Buyer that it has accepted the trade-in goods as part payment for the Goods purchased by the Buyer.
- 4.4 The Seller will record the trade-in of any Goods on any invoice issued to the Buyer under clause 3.3 of these Terms and Conditions of sale.

#### 5. PAYMENT

- 5.1 The Buyer agrees to pay the price specified in the Seller's tax invoice for any Goods invoiced on the date for payment specified in the tax invoice and if no date is specified, within one (1) calendar month after the end of the month the tax invoice is dated.
- 5.2 Failure by the Buyer to pay the tax invoice for the Goods in accordance with clause 5.1 shall entitle the Seller to immediately cancel all outstanding contracts, agreements or orders made or placed by the Buyer, without incurring any penalty or liability for such cancellation.
- 5.3 Notwithstanding the Seller's rights under clause 5.2, the Seller reserves the right to charge interest at the rate of twenty (20) per cent per annum, calculated and compounding monthly, on any amount owing by the Buyer to the Seller from the date the amount was due until the date it is actually paid.

#### 6. SELLER'S LIABILITIES FOR GOODS SUPPLIED

- 6.1 The Buyer acknowledges and agrees that:
  - (a) no supply or sale of any Goods by the Seller to the Buyer is, or amounts to a sale by description or a sale by sample;
  - (b) the Buyer has relied on its own knowledge and expertise when purchasing the Goods as to their suitability for any purpose;
  - (c) the Seller has not given any warranties or made any representations as to the suitability of the Goods for any purpose and no previous supplies or purchases of Goods by the Buyer from the Seller is indicative that the Goods are of a particular quality or type or suitable or fit for a particular purpose; and
  - (d) if there is a modification in the design or specifications of the Goods between the date on which the Goods Order was accepted by the Seller and the date the Goods were Delivered

#### 7. RETENTION OF TITLE TO GOODS

- 7.1 The Seller and the Buyer acknowledge and agree that:
  - (a) the legal and equitable title, ownership and property in the Goods remains with the Seller absolutely at all times until the Seller has been paid in full for the Goods purchased by the Buyer under all individual contracts, agreements or orders between the Seller and the Buyer;
  - (b) the Buyer is a trustee and bailee of the Goods and the proceeds received by or owed to the Buyer from the sale of the Goods by the Buyer must comply with clause 7.2;
  - (c) the trust and bailment referred to in clause 7.1(b) continues in relation to separate purchases of the Seller's Goods Delivered to the Buyer until the price for the Goods under all individual contracts, agreements or orders between the Seller and the Buyer has been paid in full;
  - (d) the Goods are at the Buyer's risk on and from the time the Goods are Delivered to the Buyer; and
  - (e) the Buyer's right to possession of the Goods immediately ceases if it does anything, or fails to do anything, which results, or would result, in an event occurring under clause 15 of these terms and conditions of sale.
- 7.2 Until Goods are paid for in full, the Buyer must:
  - (a) not sell or supply any Goods to any person outside its ordinary or usual course of business;
  - (b) not sell or supply any Goods to any person in its ordinary or usual course of business as an agent for the Seller and agrees to:
    - (i) place any proceeds from the sale or supply of any Goods into a separate bank account, which is at all times identifiable as the money of the Seller ensuring that none of the proceeds are mingled with any other money or deposited into any overdrawn account; and
    - (ii) pay to the Seller the proceeds referred to in clause 7.2.(b)(i) on their due date for payment plus any interest payable;
  - (c) not allow any person to create, have or acquire any security interest in the Goods;
  - (d) insure the Goods, in the name of the Buyer and the Seller, for their full replacement value with a reputable insurer and provide a certificate of currency of such insurance to the Seller immediately upon written request by the Seller;
  - (e) properly and separately store and label the Goods Delivered so as to distinguish them from the Buyer's own goods, in a manner which makes them readily identifiable as the Seller's Goods;
  - (f) where the Buyer has not been paid for the Goods by a third party, agrees to assign its claim against that party to the Seller upon the Seller giving the Buyer notice in writing to that effect.
- 7.3 The Buyer acknowledges and agrees that the Seller is not obliged or required to distinguish between Goods sold to the Buyer pursuant to invoices which remain unpaid and Goods sold to the Buyer pursuant to invoices which have been paid.
- 7.4 If the Buyer fails to pay for any of the Goods by their due date for payment, or as otherwise agreed in writing between the Buyer and the Seller, the Seller may enter the Buyer's premises, or the premises of any person holding the Goods for and on behalf of the Buyer, during business hours without the requirement to provide any previous notice, for the purpose of auditing, inspecting or retaking and recovering possession of the Goods and the Buyer hereby grants to the Seller an irrevocable licence to do so without liability whatsoever, including but not limited to trespass or any resulting damage. The Buyer agrees that the Seller may use reasonable force in exercising its power of auditing, inspecting or retaking possession of the Goods under this clause 7.4.
- 7.5 The Buyer acknowledges and agrees that clause 7.4 constitutes specific authority for the Seller to enter the Buyer's premises, or the premises of any person holding the Goods for and on behalf of the Buyer, for the purposes specified in clause 7.4 and the Seller may rely on clause 7.4 and this clause 7.5 against the Buyer in the event of a dispute, mediation, arbitration or court proceeding with the Buyer.
- 7.6 The Buyer indemnifies the Seller against any claim made by the Buyer or a third party arising out of the Seller exercising its rights under clause 7.4 and 7.5.
- 7.7 The Buyer acknowledges and agrees that the Seller will not be deemed to be relinquishing any of its rights as a creditor when exercising any of its rights as owner of the Goods under this clause 7, and its security interest shall continue in full force and effect.
- 7.8 The express and implied terms of this clause 7 continue even if any contract, agreement or order between the Seller and the Buyer is repudiated by the Buyer.
- 7.9 The Seller does not relinquish any of its rights against the Buyer until all monies due and payable to it by the Buyer, are paid in full.

#### 8. MATTERS BEYOND CONTROL OF SELLER

- 8.1 The Seller will not be responsible to the Buyer in any way if it is unable or is delayed in performing its obligations under any contract, agreement or order relating to the sale and Delivery of Goods to the Buyer, if that inability or delay arises directly or indirectly from the happening of any event not within the reasonable control of the Seller.

#### 9. MATTERS RELATING TO GOODS ORDERS

- 9.1 The Buyer acknowledges and agrees that:
  - (a) if a dispute arises between the Buyer and Seller concerning any contract, agreement or order (including but not limited to telephone, facsimile or computer-generated orders), the internal records of the Seller will be, except in the case of manifest error, conclusive evidence of what Goods were ordered by the Buyer;
  - (b) each order it places with the Seller will be, and be deemed to be, a representation by the Buyer that at the time it placed the order for the purchase of the Goods, it was solvent and able to pay all of its debts as and when they fell due; and
  - (c) failure by the Buyer to pay the Seller's tax invoice on the date due for payment is conclusive evidence that the Buyer had no reasonable grounds for making the representation referred to in clause 9.1(b).

#### 10. CLAIMS FOR DAMAGED OR DEFECTIVE GOODS

- 10.1 The Seller may refuse any claim made by the Buyer for any Goods which the Buyer alleges were delivered in a damaged condition, unless the Buyer gives written notice to the Seller within three (3) days of Delivery of those Goods.
- 10.2 The liability of the Seller in the event of a claim by the Buyer for any alleged damaged Goods will be limited to the replacement value of those Goods or the supply of equivalent Goods provided that there is evidence that the Seller caused the damage through its negligent act or omission.
- 10.3 The liability of the Seller in the event of a claim by the Buyer for defective goods within any warranty period will be limited to parts replacement only. Costs associated with removing the defective item on-site, freight to and from the Seller's service centre; and reinstallation of the repaired item on-site are the liability of the Buyer.

#### 11. CONTAINERS AND PALLETS

- 11.1 The Buyer agrees to return to the Seller any pallets delivered to the Buyer with the Goods in accordance with the Seller's written instructions for returning those pallets.
- 11.2 If the Buyer loses, destroys or damages any of the Seller's pallets, the Seller has the right to recover from the Buyer the cost of those pallets at the prevailing commercial rate for pallets on the date the pallets were lost, destroyed or damaged. This cost may be recovered by the Seller from the Buyer as a liquidated debt.

#### 12. RETURN OF GOODS

- 12.1 The Seller may refuse to accept the return of Goods by the Buyer if they have been used and/or it is longer than fourteen (14) days from Delivery of those Goods.
- 12.2 If the Seller accepts the return of the Goods a restocking fee equal to fifteen (15) per cent of the price of those goods will apply.

#### 13. ASSIGNMENT

- 13.1 No contract, agreement or order between the Seller and the Buyer may be assigned without the Seller's written consent, which consent may be given or withheld by the Seller in its absolute discretion.

#### 14. BUYER WARRANTY

- 14.1 If the Buyer is a corporation, it warrants to the Seller that the individual signing of any contract, agreement, order or these terms and conditions of sale on the Buyer's behalf has the necessary authority to sign on behalf of and to bind the Buyer.
- 14.2 The individual signing any contract, agreement, order or these terms and conditions of sale on the Buyer's behalf warrants that he or she has the necessary authority to sign on behalf of and to bind the Buyer.
- 14.3 In signing this Contract, the Buyer shall be deemed to have warranted, represented, acknowledged and agreed as follows:
- (a) the Buyer has read and understands and wishes to be bound by the full terms, conditions and effect of this Contract;
  - (b) all purchases by the Buyer under this Contract are for commercial purposes only;
  - (c) the person who signed this Contract was authorised by the Buyer to do so;
  - (d) the particulars contained in this Contract are in all respects true and correct;
  - (e) the Buyer relied solely on its own skill and judgement in entering into this Contract and selecting the Goods ordered by it;
  - (f) the Seller has not made any representation or promise to the Buyer of any nature in respect of any matter arising out of this Contract, including the entering into this Contract;
  - (g) this Contract represents the entire Contract as concluded between the Buyer and the Seller, and supersedes any other Contract, terms and / or conditions between the Buyer and the Seller;
  - (h) no representation made by the Seller or the Buyer concerning the Goods shall be an implied term of this Contract or form the subject matter of a separate Contract, subsidiary or collateral with this Contract; and
  - (i) the Buyer has not been induced to enter into this Contract by any representation, oral or otherwise, made for or on behalf of the Seller.

#### 15. INTELLECTUAL PROPERTY

- 15.1 The Seller will retain all copyright and other proprietary rights in any of the Seller's confidential information and any of the Seller's material, including documents, drawings, certifications and instructions provided to the Buyer. The Buyer must not use any of the Seller's intellectual property including copyright, patents, trademarks, logos, know-how and any other type of intellectual property belonging to the Seller without the prior written consent of the Seller (such consent may be granted or withheld in the Seller's absolute discretion). If the Seller grants its consent to the Buyer, the Buyer must not disclose, transfer, transmit or otherwise make available to any third party in any manner or form, any material or their contents or any information relating to them or the Goods without the Seller's written consent.

#### 16. TERMINATION

- 16.1 The Seller may immediately terminate any contract, agreement or order by notice in writing to the Buyer and enter the Buyer's premises at any time, without notice, without being liable to trespass and using reasonable force if necessary and retake possession of any Goods without prejudice to any other rights the Seller may have under these terms and conditions of sale or any contract, agreement or order if the Buyer:
- (a) commits a breach of any term of any contract, agreement or order between the Seller and the Buyer or these terms and conditions of sale;
  - (b) ceases to carry on its current business or a material part of its current business, or threatens to do either of these things;
  - (c) threatens or resolves to wind itself up or to appoint an administrator or liquidator or gives notice of an intention to do so;
  - (d) has a receiver or a receiver and manager appointed to it;
  - (e) is placed under administration, liquidation or makes or proposes to make any arrangement with its creditors or becomes bankrupt;
  - (f) has a judgement debt entered into against the Buyer for an amount exceeding NZD\$1,000 and this is not satisfied by the Buyer within 14 days.
- 16.2 Termination of this Contract shall not affect the rights and liabilities of the Seller and the Buyer in respect of this Contract accrued as at the date of termination.

#### 17. RECOVERY OF COSTS

- 17.1 The Buyer indemnifies the Seller from and against all costs, charges and expenses incurred by the Seller resulting from any breach by the Buyer of any contract, agreement, order or these terms and conditions of sale.

#### 18. SELLER'S LIABILITY

- 18.1 To the full extent permitted by law, the Seller is not liable to the Buyer for any direct, indirect, consequential or contingent loss, liability, cost or expense from the use of the Goods by the Buyer, its employees, servants, agents, representatives or any other party, and without limitation includes but is not limited to loss occasioned by defective design, workmanship or materials.

#### 19. GOVERNING LAW

- 19.1 This Agreement is governed by the laws of New Zealand. The parties accept the exclusive jurisdiction of the New Zealand courts and any court that may hear appeals from those courts.

#### 20. APPLICATION OF THIS CONTRACT

- 20.1 These terms and conditions and any Collateral Documents apply to all dealings between the Seller and the Buyer under this Contract.
- 20.2 No terms or conditions of the Buyer are binding on the Seller unless expressly agreed to in writing by the Seller.
- 20.3 If there is a breach of this Contract, all monies outstanding to the Seller become immediately due and payable and the Seller may, without prejudice to its rights under this Contract, and its rights generally, call up all moneys owing to it by the Buyer, retain all moneys paid on account and / or cease further supply.

#### 21. COSTS

- 21.1 Stamp duty (if any), registration and lodgement fees, taxes (including any goods and / or services taxes) or any other kinds of government charge or fee incurred as a result of the sale of the Goods by the Seller to the Buyer under this Contract shall be paid by the Buyer.
- 21.2 The Buyer shall pay any losses, expenses, damages, commissions, interest and costs, including solicitor and own client legal costs, arising from the Buyer's failure to comply with its obligations, including payment of all invoices, under this Contract and any Goods Order. Such losses, expenses, damages, commissions, interest and costs may be recovered by the Seller as a liquidated debt.

#### 22. TIME

- 22.1 Subject to the terms of this Contract, time shall be of the essence unless the parties agree in writing to any time requirements being extended or abridged in which event the time so extended or abridged shall be of the essence of this Contract.

#### 23. CHARGE

- 23.1 The Buyer hereby charges with payment of all moneys and compliance with all obligations owed by the Buyer to the Seller under this Contract all beneficial interest (freehold and leasehold) in real property, held now or in the future by the Buyer. The Buyer agrees that if demand is made upon it, him or her by the Seller, the Buyer will immediately execute a mortgage in registrable form. The Buyer unconditionally consents to the Seller lodging a caveat or caveats noting its interest pursuant to this equitable mortgage. The Buyer irrevocably and by way of security appoints the Seller or any officer of the Seller to be its, his or her true and lawful attorney to execute and register such instruments, including and without limiting the generality of the foregoing, executing and registering a mortgage over any real property. The Buyer authorises the attorney appointed pursuant to this clause to enter into conflict transactions within the meaning of any applicable law.

#### 24. SECURITY INTEREST

- 24.1 This Contract constitutes a security agreement for the purposes of the PPSA and the Buyer grants to the Seller a security interest in all Goods supplied to the Buyer under this Contract and in the Buyer's present and after acquired property.
- 24.2 The security interest relates to all Goods previously supplied by the Seller to the Buyer (if any) and to all Goods that will be supplied in the future by the Seller to the Buyer.
- 24.3 The Buyer 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 Seller may reasonably require to register a financing statement or financing change statement on the PPSR;
- (b) indemnify and upon demand reimburse the Seller for all expenses incurred in registering a financing statement or financing change statement in the PPSR or releasing any Goods charged thereby;
- (c) not register a financing change statement or a change demand without the prior written consent of the Seller; and
- (d) immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change on the nature of proceeds derived from such sales.

- 24.4 The Seller and Buyer agree that nothing in section 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

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

- 24.6 Unless otherwise agreed in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with s 148 of the PPSA.

- 24.7 The Buyer shall unconditionally ratify any actions taken by the Seller under clauses 24.1 to 24.6.

- 24.8 The Buyer must not enter into any security agreement that allows any other person to have or to register a security interest in relation to the Goods or any proceeds of sale of the Buyer of the Goods.

- 24.9 For the purposes of this clause: "PPSA" means the *Personal Property Securities Act 1999*, "PPSR" means the *Personal Property Securities Register* created pursuant to the PPSA and the expressions "accession", "collateral", "financing statement", "financing change statement", "security agreement", "security interest", "perfected security interest", "purchase money security interest" and "verification statement" have the meanings given to them by the PPSA, and references to sections are sections of the PPSA.

#### 25. TRUST

- 25.1 This Contract binds the Buyer both personally and as trustee of any trusts of which the Buyer is trustee.

#### 26. MISCELLANEOUS

- 26.1 The Buyer must notify the Seller of any change in its structure or management, including any change of director, secretary, partnership, trusteeship and business address.

- 26.2 All notices and other written communications provided for in this Contract shall be given or served by certified or registered mail with postage pre-paid, by hand delivery or by facsimile transmission as follows:

- (a) to the Seller, to **Unit 9, 31 Stevens Street, Waltham, Christchurch 8023, New Zealand;** and
- (b) to the Buyer, to you at the address and facsimile number contained in this Contract, Goods Order or Credit Application.

- 26.3 Where the Buyer comprises more persons than one, the provisions of this Contract with respect to such party shall bind all of those persons severally and jointly. In any claim arising out of a breach of this Contract or any Goods Order, proportionate liability will not be pleaded in defence by the Buyer as between those persons and each of those persons comprising the Buyer shall be regarded as wholly liable to the Seller in respect of any such breach.

- 26.4 Any waiver by the Seller of any default by the Buyer in the strict and literal performance of or compliance with any provision, condition or requirement in this Contract, or any delay by the Seller in exercising any remedies available to the Seller under this Contract, will not constitute a variation or waiver of any provision, condition or requirement of this Contract, or remedy available to the Seller.

- 26.5 If any term or provision of this Contract are found to be to be invalid, illegal or unenforceable, such term or provision is to be severed from the remainder of the terms and provisions of this Contract and is to be deemed never to have been part of this Contract, with the remainder of the terms and provisions of this Contract subsisting and remaining in full force and effect unless the basic purpose or purposes of this Contract would thereby be defeated.

- 26.6 To the extent of any inconsistency in this Contract, these terms and conditions of sale prevail, and the other terms and conditions in all Collateral Documents are to be construed so as to give paramount effect to the terms and conditions of sale.

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