

**TSUBAKI AUSTRALIA PTY LTD**

**TERMS AND CONDITIONS OF QUOTATION OR SALE**  
**(EFFECTIVE 1 JULY 2005)**

**1. INTERPRETATION**

- (a) **Buyer** means the person, firm or corporation named in the Quotation / Invoice or Order and in the case of an individual, his executors, administrators and assigns, and in the case of a corporation, its successors and assigns.

**Contract Price** means:

- (1) in the case where a Quotation has been issued by the Seller to the Buyer for the supply of the Goods, such amount as the Seller has specified in the Quotation as being the Contract Price; and
- (2) in any other case, the price determined by the Seller and specified in the Seller's Invoice in respect of the relevant Goods.

**Goods** means those goods the subject matter of and particularised in the relevant Quotation or Invoice, as the case may be.

**G.S.T.** means any goods and services tax under *A New Tax System (Goods and Services Tax) Act 1999* ("GST Act").

**Invoice** means any invoice given by the Seller to the Buyer in connection with its supply to the Buyer of the Goods and in **which these terms and conditions are referred to**.

**Order** means the written or oral offer to buy the Goods from the Seller made by the Buyer to the Seller;

**Quotation** means any quotation given by the Seller, orally or in writing, to the Buyer for the Seller to supply to the Buyer the Goods and in which these Terms and Conditions are referred to.

**Seller** means Tsubaki Australia Pty Ltd ( ABN 45 003 232 639).

**Special Conditions** means those terms and conditions of the Seller (if any) in addition to these terms and conditions set out in the relevant Quotation, Invoice, or acceptance of any Order, as the case may be.

- (b) In the event of any inconsistency between these Terms and Conditions and any Special Conditions the Special Conditions will prevail.

**2. ENTIRE AGREEMENT**

- (a) Subject to clause 2(c) the Buyer and Seller agree that immediately the Seller communicates whether expressly or by implication (for example by the Seller making a supply to the Buyer) its acceptance of any Order placed by the Buyer with the Seller the Buyer and Seller shall be contractually bound under these Terms and Conditions as varied by any Special Conditions ("the Contract") and the Buyer and the Seller acknowledge and agree that the Contract supersedes any prior contract, arrangement or

understanding between the Buyer and the Seller. No local, general or trade custom will affect in any way the Contract.

- (b) No waiver or variation of the Contract will be binding on the Buyer or the Seller unless signed by both the Buyer and the Seller.
- (c) Notwithstanding clause 2(a) the Contract shall be subject to and conditional upon any necessary import or export licence being obtained by the Seller.

**3. QUOTATIONS**

- (a) Unless previously withdrawn a Quotation is valid for thirty (30) days from its date or such other period as is stated therein. A Quotation is not to be construed as an obligation by the Seller to sell but merely an invitation to treat and no contractual relationship shall arise therefrom until an Order has been sent by the Buyer and accepted by the Seller in writing.
- (b) The Seller shall not be bound by any conditions attached to any Order unless such conditions are expressly accepted by the Seller in writing.

**4. CONTRACT PRICE**

- (a) The Contract Price is exclusive of all sales tax, G.S.T or other value added tax, retail tax or any other tax or duty which may be imposed on or in relation to the supply of the Goods by the Seller or the acquisition of the Goods by the Buyer under the relevant Contract and all such taxes and duties will be paid and borne by the Buyer.
- (b) Where the Seller is liable to pay any tax or duty referred to in sub paragraph (a) of this clause 4, the Buyer must with the Contract Price pay to the Seller an amount which results in the Seller receiving the Contract Price after having accounted for such payments.
- (c) If by reason of any legislation or regulation or government action, or other causes beyond the Seller's control, any kind of tax, duty or impost becomes chargeable or applicable to the supply made under this Contract (at the time after the making of the relevant Contract) is imposed or is incurred by the Seller, the Seller will notify the Buyer and the Buyer must pay the Seller the amount of any such charge or duty.

**5. PAYMENT**

- (a) Unless otherwise agreed in writing, the Buyer must pay the Contract Price to the Seller within thirty (30) days of the end of that month that the Goods are delivered to the Buyer. Notwithstanding the foregoing, the Seller may without prejudice to its rights, and, in its sole and absolute discretion, elect not to enforce payment of the Contract Price for any particular period.
- (b) The Buyer must pay all other costs and amounts payable to the Seller under these Terms and Conditions immediately on demand by the Seller.
- (c) If the Buyer fails to pay the Contract Price to the Seller in full in accordance with this clause, then without prejudice to any other rights under the relevant Contract or available by law, the Seller may:
  - (1) charge the Buyer interest (at a rate which is equal to the overdraft rate charged by the Seller's bankers from time to time) on the Contract Price or so much

thereof as remains outstanding from time to time, computed from the due date for the payment of the same until the date that the Contract Price is received and calculated on daily balances; and/or

- (2) suspend or cancel performance (including the supply/dispatch of the relevant Goods) of any of its contractual obligations to the Buyer; and/or
  
- (2) cancel all trade discounts or rebates previously extended by it to the Buyer.

## **6. DELIVERY AND PASSING OF RISK**

- (a) The Goods will be at the Buyer's risk:
  - (1) in the case where the Seller arranges for their delivery to the Buyer, immediately upon their arrival at the Buyer's premises; and
  - (2) in the case where the Buyer arranges for the delivery of the Goods, immediately upon the Goods being placed into the hands of the Buyer's carrier or the Buyer's agent's carrier (as the case may be).
- (b) Subject to clause 6(c), the Buyer will be responsible at his/her/its expense for arranging the delivery of the Goods and must accept delivery of the Goods . Freight rates, handling and insurance will be at the cost of the Buyer.
- (c) Notwithstanding anything contained in clauses 6(a) and (b), the Seller may in its absolute and unfettered discretion, at the cost of the Buyer:
  - (1) arrange for the delivery of the Goods to the Buyer; and
  - (2) insure the Goods against such risks as the Seller considers appropriate for the period from the time the Goods leave the Seller's premises up to the time the Goods reach the Buyer's premises.
- (d) The Buyer acknowledges that any time quoted to him/her/it by the Seller for delivery is an estimate only. The Seller may suspend delivery or extend delivery time in whole or part for any reason whatsoever. The Seller will not be liable in any way to the Buyer (including without limitation for loss of profits or other consequential loss) for any loss arising out of any failure or delay in delivery of the Goods or in connection with damage to the Goods howsoever caused during delivery.
- (e) The Seller may arrange for delivery of the Goods in installments and these terms and conditions will apply to the supply of each installment as if that supply was the subject of a separate contract between the Seller and the Buyer. In particular, the Buyer will pay the Seller for each installment so supplied, irrespective of the failure or delay in delivery of any other installment.

## **7. TITLE AND PROPERTY**

Legal and beneficial title to the Goods will remain with the Seller until the Contract Price has been paid in full to the Seller. Until such time and notwithstanding the Delivery of the Goods to the Buyer:

- (a) the Seller may retain possession of all documents or certificates of ownership or other evidence of title to the Goods;
- (b) the Buyer must store the Goods separately from any other goods in the Buyer's possession and in such a manner as to indicate that the Goods are the property of the Seller;
- (c) the Buyer will hold the Goods as bailee on trust for the Seller.

**8. WARRANTIES, EXCLUSIONS AND ACKNOWLEDGMENTS**

- (a) Unless the Buyer is notified to the contrary by the Seller in writing the Seller warrants that the Goods cover faulty workmanship and material only with a maximum period of twelve (12) months from the date of delivery in either case.
- (b) The Buyer's sole remedy in respect of the Seller's breach of the warranty set out in clause 8(a) is to have repaired or replaced any defective Goods or part thereof which are returned to the Seller within the period referred to in clause 8(a) (freight prepaid by the Buyer) and which in the Seller's sole and absolute discretion are defective in material or workmanship.
- (c) The warranty in clause 8(a) will not apply to any Goods or part thereof which have been subject to misuse, neglect, accident or improper installation.
- (d) The Seller makes no warranty regarding any item of equipment included in the Goods, which is not manufactured by the Seller. However, to the extent possible the Seller assigns to the Buyer the benefit of any warranties it has obtained from its suppliers of such Goods.
- (e) The Buyer acknowledges and agrees that:
  - (1) the Goods are of a size, design, capacity, manufacture, workmanship and material selected by the Buyer;
  - (2) the Buyer is fully satisfied that the Goods are suitable for all the Buyer's purposes;
  - (3) the Buyer in ordering the Goods has relied entirely on its own judgment and not on any statements, written or oral, made by the Seller, its employees or agents;
  - (4) all promises, warranties, and conditions express or implied by law or otherwise with respect to the Goods are hereby expressly negated and extinguished to the extent permitted by law;
  - (5) the Seller will not be liable to the Buyer for any liability, claim, loss, damage or expense of any kind (direct or indirect) in connection with the Goods or any inadequacy or defect (latent or patent) in the Goods;
  - (6) the Seller will not be liable in any way for any contingent, consequential or resulting loss or damage or any sum being or representing loss of profits or earnings or amounts payable in respect of any accident in connection with the use or condition of the Goods; and
  - (7) the Seller is under no liability for labour charges or consequential losses incurred as a result of the failure of the Goods,

but these Terms and Conditions will not be read or construed so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying any condition or warranty to the extent that it is implied by the **Trade Practices Act, 1974** or by any other statute of any state or territory of the Commonwealth of Australia and which is not legally capable of being excluded, restricted or modified.

(f) The liability of the Seller for a breach of a condition or warranty implied by a provision of Division 2 of Part V of **the Trade Practices Act, 1974** will be limited to any one of the following:

- (1) the replacement of the relevant Goods or the re-supply of equivalent Goods;
- (2) the repair of the relevant Goods;
- (3) the payment of the cost of replacing the relevant Goods or;
- (4) the payment of the cost of having the relevant Goods repaired,

and the Seller may, in its sole and absolute discretion, determine which of the foregoing limits will apply in any case.

## **9. CANCELLATION AND TERMINATION**

(a) The Buyer may not cancel an Order or any part of an Order:

- (1) in respect of any Goods made specially to the Buyer's requirements;
- (2) placed more than ten (10) days prior to the date of the purported notice of cancellation.

(b) If the Buyer wishes to cancel the whole or any part of an Order then subject to clause 9(a) the Buyer must serve a cancellation notice on the Seller.

(c) If the Buyer gives a cancellation notice to the Seller the Buyer will be liable to immediately reimburse the Seller for all costs incurred by the Seller up to the date that such notice is received by the Seller.

(d) The Seller may terminate the Contract by notice in writing to the Buyer upon:

- (1) an application to make the Buyer bankrupt or to dissolve the Buyer to wind up the Buyer; or
- (2) the Buyer resolving to enter into any form of insolvency administration; or
- (3) a receiver, a receiver and manager, provisional liquidator, special investigator, administrator or official manager being appointed to the Buyer; or
- (4) the Buyer failing to remedy a breach of the Contract within seven (7) days of the Buyer's receipt of a notice from the Seller stipulating the breach or breaches complained of.

(e) If the Seller terminates the Contract the Seller will on and from the date of the termination be relieved of any future obligations to the Buyer to supply any Goods to the Buyer and all Orders which have been placed by the Buyer up to the date of such termination may in the absolute discretion of the Seller be treated as having been cancelled by the Buyer.

- (f) If the Seller terminates this Contract all monies payable by the Buyer to the Seller under this Contract shall become immediately due and payable.
- (g) Termination by the Seller will not affect any antecedent breach by the Buyer.
- (h) The rights of the Seller under this clause are in addition to any rights of the Seller conferred by common law or statute.
- (i) The Buyer will not be entitled to any damages (including without limitation loss of profit) in connection with any Termination of the Contract by the Seller.

**10. RETURN OF GOODS**

- (a) Claims for shortages, loss or damage in respect of the Goods may only be made by the Buyer within seven (7) days of receipt by the Buyer of the Goods.
- (b) Claims for credit or return will only be considered if the Goods are returned by the Buyer to the Seller's premises within fourteen (14) days from the date of their receipt by the Buyer.
- (c) The Seller may but will not be bound to accept a return of the Goods provided that no returns shall be accepted by the Seller unless agreed in writing by an expressly authorized officer of the Seller and also provided that all costs of returning the Goods to the Seller (including without limitation freight charges, handling and insurance) are paid by the Buyer.
- (d) Any discount or allowance (however determined) allowed by the Seller to the Buyer in respect of the Goods will be credited against the price of the Goods and will represent a reduction of that price.

**11. CONFIDENTIAL INFORMATION**

All plans, drawings, computer programmes, designs or specifications supplied by the Seller to the Buyer will remain the property of the Seller. Any information derived therefrom or otherwise communicated to the Buyer must be treated as secret and confidential. Except strictly for the purposes of the Contract or with the prior written consent of the Seller given or withheld on any terms thought fit by the Seller in its sole and absolute discretion, such information must not be published or disclosed to any third party or made use of by the Buyer. The Buyer will take all steps necessary to protect the confidentiality of such information including without limitation commencing legal proceedings on request of the Seller at the Buyer's cost.

**12. DISCLAIMER AND INDEMNITY**

- (a) The Seller will not be liable in any way (including without limitation in contract in tort or under statute) for any loss or damage whatsoever in connection with any information, written or oral, or assistance given to the Buyer, whether by way of advice, instruction, technical information, demonstration or otherwise.
- (b) The Buyer must fully indemnify the Seller on demand from all loss or damage (direct or indirect) to property or with respect to any personal injury from the hire, sale, delivery, or use by the Buyer of the Goods.

**13. GENERAL**

- (a) In respect of any matter or thing which must be done by the Buyer within a stipulated time frame, time shall be of the essence, consequently, the Buyer's failure to comply with such time frame shall constitute a breach by the Buyer of an essential term of the Contract.
- (b) If any provision of the Contract is held to be illegal, unenforceable or void then to the extent of such illegality, unenforceability or invalidity that provision will be considered independently of and severable from the other provisions .
- (c) A certificate by an employee of the Seller as to any act or omission of the Buyer shall be accepted by the Buyer in all courts and at all times to be prima facie evidence of the matters stated therein.
- (d) The Contract shall be construed and interpreted in accordance with the laws of New South Wales and the Buyer irrevocably agrees to submit to the non-exclusive jurisdiction of the courts of that state.
- (e) All notices given under the Contract must be in writing. A notice given by the Seller to the last known place of business of the Buyer will be deemed received on delivery or the business day in New South Wales following posting, whichever is the earlier.
- (f) In the event of a complete or partial stoppage of work at the Seller's premises due to force majeure (including without limitation, fire, power failure, strike, lock-out, floods, riot, civil commotion, government action or any other reasonable cause) the performance of the Contract may be partially or wholly suspended by the Seller in its sole and absolute discretion by notice to the Buyer at any time during or after such stoppage.
- (g) Headings in these Terms and Conditions are for convenience only and do not affect their interpretation.